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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, PETITIONER,

vs.

PHILIP YOUNG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 3, 1955

CERTIORARI GRANTED, NOVEMBER 21, 1955

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United States Court of Appeals

For the District of Columbia Circuit

No. 12,526

KENDRICK M. COLE,

Appellant,

v.

PHILIP YOUNG, ET AL.,

Appellees

Appeal From the United States District Court for the District of Columbia

---

JOINT APPENDIX

(Filed September 10, 1954.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

KENDRICK M. COLE, 114 Brooklyn Ave., Freeport, Long Island,

Plaintiff,

against

PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, members of the United States Civil Service Commission, Washington 25, D. C., and OVETA CULP HOBBY, Secretary, Department of Health, Education and Welfare, Washington 25, D. C.,

Defendants.

Amended Complaint for Declaratory Judgment

Plaintiff, by his attorney, James H. Heller, alleges as follows:

First: That this is an action for a declaratory judgment and other equitable relief, to restore plaintiff to employment in the Food & Drug Administration of the Department of Health, Education & Welfare, which arises under the Constitution and Laws of the United States, and involves a matter in controversy, exceeding the sum or value of $3,000.00, exclusive of interest and costs.

Second: That the jurisdiction of this Court arises under and by virtue of Sections 1331, 2201 and 2202 of Title 28 of the United States Code, as amended.

Third: That plaintiff is a citizen of the United States and a resident of the State of New York, and brings this action in his own right.

Fourth: That plaintiff is an honorably discharged veteran of the United States Army, and was classified as a five point veteran's preference eligible under and pursuant to Section 14 of the Veterans' Preference Act of 1944, Section 863 of Title 5, United States Code.

Fifth: That prior to the 13th day of November, 1953, plaintiff held a position in the classified Civil Service as a Food & Drug Inspector with the Food & Drug Administration, Department of Health, Education & Welfare, New York District, New York, New York, at an annual salary of $4,955.

Sixth: On or about the 20th day of October, 1953, plaintiff received a request to come to Washington, D. C., from the Chief of Personnal Security, Department of Health, Education & Welfare, in connection with an investigation regarding plaintiff's retention in employment, pursuant to the provisions of Executive Order 10450 (April 29, 1953, 18 F. R. 2489).

Seventh: During said investigation, plaintiff was asked numerous questions concerning his attitudes, associations and friends. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 1, is a memorandum concerning plaintiff's investigation by the Chief of Personnel Security, Department of Health, Education & Welfare, and his assistant).

Eighth: Thereafter, and on the 13th day of November, 1953, plaintiff received a Notice of Suspension "pending investigation under Executive Order 10450". (Annexed

hereto and made a part hereof, as plaintiff's Exhibit 2, is a photostatic copy of a Notice of Personnel Action, dated November 13, 1953, suspending plaintiff from his employment).

Ninth: Thereafter, and on or about the 25th day of November, 1953, plaintiff received a written statement of charges that:

"1. That you established and have continued a close association with individuals reliably reported to be Communists.

2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.

3. That you have, by your own admission, donated funds to the Nature Friends of America.

4. That you have contributed your services in the form of work to the Nature Friends of America.

5. That you have attended social gatherings of the Nature Friends of America."

(Annexed hereto and made a part hereof, as plaintiff's Exhibit 3, is a photostatic copy of a written statement of charges, dated November 25, 1953.)

Tenth: Thereafter, and on or about the 23rd day of December, 1953, plaintiff declined to answer the charges and urged that the action of the Secretary, Department of Health, Education and Welfare, was a violation of plaintiff's right of "fredoom of association". (Annexed hereto and made a part hereof, as plaintiff's Exhibit 4, is a

copy of a letter dated December 23, 1953, from plaintiff to the Assistant to the General Counsel of the Department of Health, Education & Welfare).

Eleventh: Thereafter, and on or about the 4th day of January, 1954, plaintiff was notified that his case had been forwarded to the Secretary, Department of Health, Education & Welfare, for final disposition, inasmuch as it appeared that plaintiff did not desire a "hearing". (Annexed hereto and made a part hereof, as plaintiff's Exhibit 5, is a photostatic copy of a letter dated January 4, 1954, from the Assistant to the General Counsel, Department of Health, Education & Welfare, to plaintiff).

Twelfth: Thereafter, and on or about the 15th day of January, 1954, plaintiff was notified that his termination from employment was ordered, effective January 20, 1954, in that his continued employment was not "clearly consistent with the interests of national security", which notice, however, did not inform plaintiff of his right to appeal to the United States Civil Service Commission. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 6, is a photostatic copy of a Notice of Adverse Determination, ordering plaintiff's termination from his employment effective January 20, 1954.)

Thirteenth: Thereafter, and on or about the 27th day of January, 1954, plaintiff's counsel requested reconsideration of the adverse determination of defendant, Secretary, Department of Health, Education & Welfare, and requested a re-opening of plaintiff's case by said defendant, on the ground that plaintiff's physical and emotional condition at the time he refused to answer the statement of "Charges", heretofore annexed as plaintiff's Exhibit 3, precluded plaintiff from intelligently exercising his rights,

in that he was then in the midst of a "post-operational depression" and, if plaintiff was permitted to re-open his case, he would prove that he was "a conscientious and loyal employee, whose retention in government employment is totally consistent with the interests of national security." (Annexed hereto and made a part hereof, as plaintiff's Exhibit 7, is a photostatic copy of plaintiff's request for re-opening of plaintiff's case; annexed hereto and made a part hereof, as plaintiff's Exhibit 8, is plaintiff's supporting affidavit in support of the request for a re-opening of his case, sworn to January 26, 1954; annexed hereto and made a part hereof, as plaintiff's Exhibit 9, is a photostatic copy of plaintiff's physician's supporting affidavit in support of plaintiff's request for a re-opening of his case, sworn to January 27, 1954.)

Fourteenth: Thereafter, and on or about the 29th day of January, 1954, plaintiff's counsel informed the Department of Health, Education & Welfare that if plaintiff was permitted to answer the derogatory information contained in said Statement of Charges, heretofore annexed as plaintiff's Exhibit 3, and have a "hearing", plaintiff would prove that:

1. he did not knowingly establish or maintain any close or sympathetic association with any member of the Communist Party.

2. he did not maintain a sympathetic association with the Nature Friends of America, except in connection with his hobby, hiking and camping, and in this connection he only used a cabin operated by this organization as a guest of an individual in possession of a key to this cabin. Moreover, he specifically refused to become a member of said organization.

3. he donated no work to the Nature Friends of America, except to mark or blaze trails in the woods in connection with his hobby of hiking and camping.

(Annexed hereto and made a part hereof, as plaintiff's Exhibit 10, is a copy of a letter from plaintiff's counsel to the Assistant to the General Counsel, Department of Health, Education & Welfare, dated January 29, 1954.)

Fifteenth: Thereafter, and on or about the 4th day of February, 1954, plaintiff was notified that his request for a hearing was denied, which Notice of Adverse Determination did not advise plaintiff of his right to appeal to the United States Civil Service Commission. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 11, is a photostatic copy of a letter from defendant, Secretary, Department of Health, Education & Welfare, to plaintiff's counsel, dated the 4th day of February, 1954.)

Sixteenth: Thereafter, and on or about the 10th day of February, 1954, plaintiff requested defendant, Secretary, Department of Health, Education & Welfare, to re-consider her original action and her action of February 4, 1954, denying plaintiff the right to a hearing, by reason of the fact that:

"(1) the charges contained in the letter of November 25, 1953 were insufficient on their face and not in compliance with Section 14 of the Veterans' Preference Act (5 U. S. C. Sec. 863) or the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.);

"(2) that Executive Order 10450, as it applies to the Department of Health, Education and Welfare, is unconstitutional, and in violation of the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, et seq.);

"(3) that the Act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-3) is unconstitutional insofar as it purports to grant an unlawful exercise of the legislative power to the executive."

(Annexed hereto and made a part hereof, as plaintiff's Exhibit 12, is a photostatic copy of a letter from plaintiff's counsel to defendant, Secretary, Department of Health, Education & Welfare, dated February 10, 1954.)

Seventeenth: Thereafter, and on or about the 24th day of February, 1954, plaintiff was notified that his request for re-consideration of the decision of defendant, Secretary, Department of Health, Education & Welfare, was denied; which Notice of Adverse Determination did not advise plaintiff of his right to appeal to the United States Civil Service Commission. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 13, is a photostatic copy of a letter from defendant, Secretary, Department of Health, Education & Welfare, to plaintiff's counsel, dated February 24, 1954.)

Eighteenth: Thereafter, and on or about the 25th day of February, 1954, plaintiff appealed to the Second United States Civil Service Region, United States Civil Service Commission, claiming that his discharge was in violation of Section 14 of the Veterans' Preference Act (Section 863 of Title 5, United States Code) and the Rules and Regulations of the Civil Service Commission, in that (1) he was not furnished with all of the reasons for his discharge; (2) that said discharge was arbitrary, capricious and discriminatory and not made in good faith; (3) that no notice of any adverse determination ever advised him of his right to appeal to the United States Civil Service Commission; (4) that the refusal to grant him a "hearing" pursuant to the request of January 27, 1954, was arbi-

trary, capricious and discriminatory and not made in good faith; (5) that the refusal to reconsider the denial of the request for the "hearing" pursuant to the request of February 10, 1954, was arbitrary, capricious and discriminatory and not made in good faith.

Nineteenth: Thereafter, and on or about the 3rd day of March, 1954, plaintiff was advised by the Regional Director, Second United States Civil Service Region, United States Civil Service Commission, that his appeal was denied, inasmuch as the Commission was without jurisdiction to hear appeals of employees suspended or terminated pursuant to Executive Order 10450. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 14, is a photostatic copy of the letter from the Regional Director, Second United States Civil Service Region, to plaintiff's counsel, dated March 3, 1954, denying plaintiff's right to appeal.)

Twentieth: Thereafter, and on or about the 4th day of March, 1954, plaintiff appealed directly to the Commissioners, United States Civil Service Commission, pursuant to permission granted plaintiff by the Regional Director, Second United States Civil Service Region, on March 3, 1954.

Twenty-first: Thereafter, and on or about the 5th day of May, 1954, the United States Civil Service Commission affirmed the decision of the Regional Director, Second United States Civil Service Region, on the ground that plaintiff's appeal was not within the purview of Section 14 of the Veterans' Preference Act of 1944. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 14, is a photostatic copy of a letter from John E. Blann, Chairman of the Board of Appeals and Review, United States Civil Service Commission, dated May 5, 1954, to plaintiff's counsel.)

Twenty-second: That plaintiff has rendered full and complete satisfactory service in his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare.

Twenty-third: That plaintiff in his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York, had no access to any secrets of the Government of the United States, or "classified" material, and was not in any position to influence policy against the interests of the Government of the United States, or otherwise aid or assist the enemies of the Government of the United States.

Twenty-fourth: That the action of defendant, Secretary, Department of Health, Education and Welfare, in determining that plaintiff's continued retention in employment was not clearly consistent with the interests of national security, and discharging plaintiff from his employment on or about the 15th day of January, 1954, was arbitrary, capricious, discriminatory and not made in good faith, and was taken in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States.

Twenty-fifth: That the atcion of defendant, Secretary, Department of Health, Education and Welfare, in discharging plaintiff from his employment on or about the 15th day of January, 1954, as aforesaid, was in violation of Section 14 of the Veterans' Preference Act of 1944, Section 863 of Title 5, United States Code, and the Rules and Regulations of the United States Civil Service Commission, in that plaintiff was not furnished with all of the reasons for his discharge; that no notice of any adverse determniation ever advised him of his right to appeal to the United States Civil Service Commission; that plaintiff

was never furnished with a written decision notifying him of the reasons for his discharge.

Twenty-sixth: That the action of defendant, Secretary, Department of Health, Education and Welfare, in discharging plaintiff from his employment on or about the 15th day of January, 1954, as aforesaid, was in violation of the Act of August 26, 1950, 64 Stat. 476 (Section 22-1 of Title 5, United States Code, et seq.), in that plaintiff was not furnished with all of the reasons for his discharge and was never furnished with a written decision notifying him of the reasons for his discharge.

Twenty-seventh: That the action of defendants, Members of the United States Civil Service Commission, in denying the appeal of plaintiff to the United States Civil Service Commission, pursuant to Section 14 of the Veterans' Preference Act of 1944 (Section 863 of Title 5, United States Code), was unlawful, improper and in violation of said Section of said Law.

Twenty-eighth: That defendants, Members of the United States Civil Service Commission and defendant Secretary of the Department of Health, Education and Welfare, have refused and continue to refuse to reinstate and restore plaintiff to his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York.

Twenty-ninth: That there exists between plaintiff and defendants herein, an actual controversy, and plaintiff has instituted this action for the purpose, among others, of having the aforesaid actions of defendants, in terminating plaintiff from his employment as a Food and Drug Inspector with the Food & Drug Administration, Department of

Health, Education and Welfare, New York District, New York, declared null and void and in violation of the provisions of Section 14 of the Veterans' Preference Act of 1944 (Section 863 of Title 5, United States Code); in violation of the Act of August 26, 1950, 64 Stat. 476 (Section 22-1 of Title 5, United States Code); and further, in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States.

Thirtieth: That plaintiff has exhausted all of the remedies available to him under applicable administrative procedures and has no adequate remedy at law, other than the instant action, under the jurisdiction conferred by this Court.

Thirty-first: By reason of the premises, plaintiff is entitled to relief against defendants under the Federal Declaratory Judgment Act of June 14, 1934, Title 28 of the United States Code, Sections 2201 and 2202.

Thirty-second: That no prior application for this or any other relief has been made to this or any other Court.

WHEREFORE, plaintiff prays or the following relief:

1. That the actions of defendant, Secretary, Department of Health, Education and Welfare, in determining that plaintiff's continued retention in employment as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, is not clearly consistent with the national security, and discharging him from his employment on or about the 15th day of January, 1954, be declared to be null and void and illegal and in violation of the First, Fifth and Sixth Amendments to the United States Constitution, in violation of Section 14 of the Veterans' Preference Act of 1944,

(Section 863 of Title 5, United States Code), and in violation of the Act of August 26, 1950, 64 Stat. 476, (Section 22-1 of Title 5, United States Code);

2. That the action of defendants, Members of the United States Civil Service Commission, in refusing to hear the appeal of plaintiff from the adverse determinations of defendant, Secretary, Department of Health, Education and Welfare, be declared null and void and illegal and in violation of the Veterans' Preference Act of 1944, (Section 863 of Title 5, United States Code);

3. That plaintiff be ordered reinstated and restored to his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York, as of the date of his discharge; and

4. For such other and further relief as to this Court may seem just and proper in the premises.

JAMES H. HELLER,
Attorney for Plaintiff,
1026 Woodward Building,
Washington, D. C.

Exhibit 2, Annexed to Amended Complaint

NOTICE OF PERSONNEL ACTION, DATED NOVEMBER 13, 1953.

(OFFSET)

(See opposite ☛)

STANDARD FORM 50 (7 PART)
REV. APRIL 1951
PROMULGATED BY
U. S. CIVIL SERVICE COMMISSION
CHAPTER 21, FEDERAL PERSONNEL MANUAL

(1)

DEPARTMENT OF HEALTH EDUCATION AND WELFARE
[redacted]
Food and Drug Administration

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR.—MISS—MRS.—ONE GIVEN NAME, INITIAL(S), AND SURNAME)	2. DATE OF BIRTH	3. JOURNAL OR ACTION NO.	4. DATE
Mr. Kendrick M. Cole	5-3-13	1	11-13-53

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY)	6. EFFECTIVE DATE	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
Suspension	COB 11-13-53	

FROM		TO
Food and Drug Inspector	8. POSITION TITLE	
GS-1861-7-1050 $4955 per annum	9. SERVICE, SERIES, GRADE, SALARY	
New York District	10. ORGANIZATIONAL DESIGNATIONS	
New York, N. Y.	11. HEADQUARTERS	
[X] FIELD [ ] DEPARTMENTAL	12. FIELD OR DEPT'L	[ ] FIELD [ ] DEPARTMENTAL

13. VETERAN'S PREFERENCE					14. POSITION CLASSIFICATION ACTION			
NONE	WWII	OTHER	5-PT.	10-POINT DISAB.	NEW	VICE	I.A.	REAL.

Exhibit 3, Annexed to Amended Complaint

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Nov. 25, 1953

REGISTERED MAIL

Dear Mr. Cole:

Pursuant to the authority contained in Executive Order 10450, and in accordance with the Security Regulations of this Department, a full field investigation has been conducted concerning you. Your case has been reviewed by the Director of Security, who has recommended, in accordance with the Executive Order and regulations of the Department, that you be suspended. This recommendation was approved by the Secretary on November 10, 1953.

The regulations further provide that the Under Secretary shall notify the suspended employee as soon as possible of the reasons for his suspension and that any employee who is a citizen of the United States, and who has a permanent or indefinite appointment, and who has completed his probationary or trial period shall receive a written statement of charges. This letter is, therefore, written to you in accordance with Section 5(d) and (g)(1) of the foregoing regulations of the Department.

Investigation has disclosed the following information:

1. That you established and have continued a close association with individuals reliably reported to be Communists.

2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.

Exhibit 3, Annexed to Amended Complaint

3. That you have, by your own admission, donated funds to the Nature Friends of America.

4. That you have contributed your services in the form of work to the Nature Friends of America.

5. That you have attended social gatherings of the Nature Friends of America.

Concerning the above charges, your attention is directed to Executive Order 10450, Section 8(a) which states "The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in the Federal service of the person being investigated is clearly consistent with the interests of the national security."

The above charges are based on investigative data developed which specifically refers to Section 8(a), subdivisions (3) and (5) of the Executive Order. For your information, the particular subdivisions referred to are set forth as follows:

"*Section 8(a)(3)*: Establishing or continuing a sympathetic association with * * * any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means."

"*Section 8(a)(5)*: Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter

the form of government of the United States by unconstitutional means."

The above quoted subdivisions of Executive Order 10450 have been incorporated in the security regulations of this Department under Section 3(b), subdivisions (3) and (5).

You have the right to submit within thirty days after notification of your suspension or within thirty days after issuance of this statement of charges, statements and/or affidavits, refuting or explaining the charges which were the basis of your suspension, to the Assistant to the General Counsel, Room 5450, HEW Building. Since you have a permanent appointment and have completed your probationary period, you are also entitled to a hearing if you so request. Such request for a hearing should be made within thirty days from receipt of this letter.

A copy of Executive Order 10450 and the regulations of the Department are enclosed.

Very truly yours,

NELSON A. ROCKEFELLER
Under Secretary

MR. KENDRICK MCDOWELL COLE
% Mrs. Mary B. Cole
1189 Great Plain Avenue
Needham, Massachusetts
Enclosure

Exhibit 4, Annexed to Amended Complaint

COPY

December 23, 1953

Assistant to the General Counsel
Room 5450 HEW Building
Washington, D.C.

Dear Sir:

I am writing this letter in response to a list of charges which were made against me under Executive Order 10450 in a letter dated November 25, 1953.

In the charges made against me I am not accused of committing any overt acts against the government of the United States, or of entering into any conspiracy against this Government, or of doing or saying anything which would indicate that I am disloyal to the Government of this country.

These charges concern themselves with my associations which I carry on as part of my private informal social life. I consider any request by the United States Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basis inherent right of "freedom of association."

I hereby, therefore, do refuse to make any explanation regarding the associations carried on in my private life and so long as I am a citizen of a democratic country and not a totalitarian state I shall continue to associate with any persons or groups of persons whom I see fit to choose.

I am writing this letter rather belatedly as I have just been released from the hospital after an operation for a diverticulum of the esophagus.

Respectfully,

KENDRICK M. COLE

Exhibit 5, Annexed to Amended Complaint

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Zone 25

January 4, 1954

Mr. Kendrick M. Cole:
319 West 103rd Street,
New York, New York

Dear Mr. Cole:

Receipt is acknowledged of your letter of December 23, 1953, regarding your proposed removal from employment with this Department pursuant to the provisions of Executive Order 10450.

From your letter it appears that you do not desire a hearing on this matter. Accordingly, the case has been forwarded to the Secretary for final disposition and you will be advised of the determination which is made.

Very truly yours,

HAROLD B. SIEGEL,
Assistant to the General Counsel.

Exhibit 6, Annexed to Amended Complaint

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Jan 15, 1953

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Cole:

Reference is made to a letter from the Under Secretary dated November 25, 1953, in which you were furnished a statement of charges based on data developed under Section 8(a), subdivision (3) and (5) of Executive Order 10450.

In your reply of December 23, 1953 to the Assistant to the General Counsel you advise that you refuse to make any explanations regarding the associations carried on in your private life and that you will continue to associate with any persons or groups of persons whom you see fit to choose.

Based on a study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954.

Very truly yours,

OVETA CULP HOBBY
Secretary

Mr. Kendrick McDowell Cole
319 West 103rd Street
New York, New York

Exhibit 7, Annexed to Amended Complaint

January 27, 1954

Mrs. Oveta Culp Hobby
Department of Health, Education and Welfare
Washington 25, D.C.

Re: *Kendrick McDowell Cole*

Dear Mrs. Hobby:

The above designated employee holds a permanent appointment with veteran's preference, as Food and Drug Inspector for the Food and Drug Administration.

On November 13, 1953, he received a notification of suspension pending investigation under E.P. 10450. On or about November 28, 1953, he received a set of interrogatories relating to his personal security.

He was at this time preparing to undergo an operation of an extremely serious nature, and was in no position to deal with the subject matter of the interrogatories.

Immediately following his release from the hospital and during the period of post-operational depression, he wrote a letter to the Assistant to the General Counsel in which he refused to make any answer to the interrogatories which had been submitted to him.

He has now fully recuperated and is aware of the fact that this rash act made in a time of extreme emotional depression has undoubtedly affected the course of his entire life.

He consulted this law firm and after intensive interrogation, we believe that if he is given an opportunity to fully present the facts of his case, there is no doubt that he would be completely cleared of the charges brought against him and that his retention in Federal employment would be to the benefit of the Government of the United States.

We therefore informed him that we would attempt to seek a reopening of his case and an opportunity to make written reply to the interrogatories and to be accorded the type of hearing which is customary under these circumstances.

We therefore appeal to your discretion and request that in the interests of justice and equity Mr. Cole be given an opportunity to clear his name.

We base this request on his physical and emotional condition at the time of receipt of the interrogatories and of his response to them. In support of this request, we enclose the sworn affidavits of both Mr. Cole and his personal physician.

Respectfully,

DICKSTEIN & SHAPIRO

By David I. Shapiro

DIS:DS

CC: Harold B. Siegel
Assistant to the General Counsel
Department of Health, Education
and Welfare
Washington 25, D.C.

Exhibit 8, Annexed to Amended Complaint

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

KENDRICK MCDOWELL COLE, being duly sworn, deposes and says:

I am a Food and Drug Inspector for the Food and Drug Administration, presently under suspension, and submit this affidavit in support of my request for a reopening of the security determination made with regard to my case, and my further request for permission to submit a written answer to the interrogatories dated November 25th, 1953 and for a hearing with regard to the matters raised therein.

At the time of my receipt of the interrogatories referred to above, I was under the care of Dr. Dwight Harken of Boston, Massachusetts.

I had been previously advised that it might be necessary to have an operation performed upon my esophagus.

On or about November 30th, 1953, I was examined at the Peter Bent Brigham Hospital in Boston and immediately following the examination, was informed that an operation for a diverticulum of the esophagus would be absolutely necessary. I was also advised that this operation was a major operation of an extremely delicate nature and required the services of a surgeon who specialized in operations of this type.

Needless to say, during this period of time, I was so overwhelmingly concerned with the state of my health that I had no opportunity to formulate an answer to the interrogatories which I had received.

I entered Peter Bent Brigham Hospital on December 6th, 1953, and after a period of five days of preparation, the operation was performed. I was released from the

hospital on December 20th, 1953, but continued under Dr. Harken's care for an additional period of ten days.

During this period of time, I was in a state of deep depression and emotional involvement, concerning not only the results of the operation and my general state of health but the money worries which came from the necessity of meeting hospital and doctor bills. I was in the depths of despair and it was out of this despair that I wrote my letter of December 23rd, 1953. I was emotionally in no position to make any determination as to a proper course of action and I sincerely regret what can only be characterized as an impetuous act borne of an abnormal state of mind.

Now that I have once more attained a state of emotional balance, I feel that I can clearly establish not only that I am not a security risk but even more, that I can affirmatively establish that I am a loyal and devoted American.

I seek an opportunity to avail myself of the procedures which are normally accorded in matters of this sort and specifically request that, in view of my physical and emotional condition at the time of the receipt of the interrogatories, I be given an opportunity to clear my name.

KENDRICK MCDOWELL COLE

Sworn to before me this
26th day of January, 1954.

DAVID ISRAEL SHAPIRO

Exhibit 9, Annexed to Amended Complaint

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. MARSHALL HOAG, being duly sworn, deposes and says:

That Mr. Kendrick McDowell Cole was under my care prior to his operation for a esophageal diverticulum.

I have seen him professionally three times since his return to New York, about December 31, 1953.

Mr. Cole has been nervous and appeared somewhat worried during this period.

J. MARSHALL HOAG D.O.

Sworn to before me this
27th day of January, 1954.

DAVID ISRAEL SHAPIRO

Exhibit 10, Annexed to Amended Complaint

COPY

Janury 29, 1954

Harold B. Siegel, Esq.
Assistant to the General Counsel
Department of Health, Education & Welfare
Washington 25, D. C.

Re: Kendrick M. Cole

Dear Mr. Siegel:

Pursuant to your telephone conversation with Mr. Heller today, I would like to inform you that if we are permitted to answer the derogatory information and have a hearing in this matter we will prove that:

1. Mr. Cole did not knowingly establish or maintain any close or sympathetic association with any member of the Communist Party.

2. Mr. Cole did not maintain a sympathetic association with the Nature Friends of America, except in connection with his hobby, hiking and camping, and in this connection he only used a cabin operated by this organization as a guest of an individual in possession of a key to this cabin. Moreover, he specifically refused to become a member of said organization.

3. Mr. Cole donated no work to the Nature Friends of America, except to mark or blaze trails in the woods in connection with his hobby of hiking and camping.

Moreover, we intend to prove that Mr. Cole is a conscientious and loyal employee whose retention in government employment is totally consistent with the interests of national security.

Very truly yours,

DICKSTEIN & SHAPIRO
By: DAVID I. SHAPIRO

DIS:DS

13. VETERAN'S PREFERENCE					
NONE	WWII	OTHER	5-PT.	10-POINT DISAB.	10-POINT OTHER
	X		X		

14. POSITION CLASSIFICATION ACTION			
NEW	VICE	I. A.	REAL.

15. SEX	16. RACE	17. APPROPRIATION	18. SUBJECT TO C. S. RETIREMENT ACT (YES—NO)	19. DATE OF APPOINTMENT AFFIDAVITS (ACCESSIONS ONLY)	20. LEGAL RESIDENCE
M		FROM: TO:	Yes		☐ CLAIMED ☐ PROVED STATE:

21. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements.

Pending investigation under E.O. 10450

ENTRANCE PERFORMANCE RATING:

R. Davila

R. Davila
Personnel Officer

22. SIGNATURE OR OTHER AUTHENTICATION

☆ U. S. GOVERNMENT PRINTING OFFICE : 961864

1. EMPLOYEE COPY

Exhibit 11, Annexed to Amended Complaint

Department of

HEALTH, EDUCATION AND WELFARE

Feb 4 1954

Dear Mr. Shapiro:

This is in reference to your letter of January 27, 1954, as implemented by your letter of January 29, 1954, to the Assistant to the General Counsel, requesting that Kendrick M. Cole be afforded a hearing pursuant to the provisions of Executive Order 10450 and the Security regulations of this Department.

As you know, Mr. Cole failed to exercise his right to apply for a hearing and his separation was directed. I have reviewed the information which you have forwarded in support of your request, as well as other available information. On the basis of the record, the reopening of this case does not appear to be in the interests of your client nor of this Department. Your request for such reopening is therefore denied.

Sincerely yours,

(S) OVETA CULP HOBBY
Secretary

David I. Shapiro, Esq.
Empire State Building
350 Fifth Avenue
New York 1, New York

Exhibit 12, Annexed to Amended Complaint

February 10, 1954

Mrs. Oveta Culp Hobby
Department of Health, Education and Welfare
Washington, D. C.

Re: Kendrick M. Cole

Dear Mrs. Hobby:

I am in receipt of your letter of February 4, denying a request for a reopening of the case of Kendrick M. Cole. It would appear that a government employee who has rendered long and devoted public service should, in fairness, be given every opportunity to prove beyond suspicion that his continued employment is clearly consistent with the interests of national security. If a position other than this is taken, then the Security Program, which is designed to protect the interests of national security, merely becomes a means of removing employees whose views are not orthodox. Surely this was not the intention of the Security Program or of President Eisenhower in issuing Executive Order 10450.

Your letter of February 4, indicates that a reopening of Mr. Cole's case does not appear to be in Mr. Cole's interest. I can only advise that Mr: Cole, knowing full well the penalties for perjury, will state under oath,

(a) that he did not knowingly establish or maintain any close association with any member of the Communist Party;

(b) that he did not maintain a sympathetic association with the Nature Friends of America, except in connection with his hobby, hiking and camping, and in this connection he only used a cabin operated by this organization as a guest of an individual

in possession of a key to this cabin. Moreover, he specifically refused to become a member of said organization;

(c) that he donated no work to the Nature Friends of America, except to mark or blaze trials in the woods in connection with his hobby of hiking and camping;

(d) that he donated no funds to the Nature Friends of America except the sum of approximately $1.50 to $2.00 for the use of firewood in connection with his use of a cabin owned by said organization;

(e) that he attended no social gatherings of this organization other than three, one of which was a dance, the other two being beer parties, and that he attended same as a guest of a member of said organization.

I respectfully submit for your consideration the following additional factors:

(1) the charges contained in the letter of November 25, 1953 were insufficient on their face and not in compliance with Section 14 of the Veteran's Preference Act (5 U. S. C., Sec. 863) or the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.);

(2) that Executive Order 10450, as it applies to the Department of Health, Education and Welfare, is unconstitutional, and in violation of the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.);

(3) that the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-3) is unconstitutional insofar as it purports to grant an unlawful exercise of the legislature power to the executive.

Exhibit 12, Annexed to Amended Complaint

Given the opportunity, we will show that Mr. Cole's continued employment with the government is something that should be desired by the Department of Health, Education and Welfare, inasmuch as it would seem to be the desire of the Department to retain in employment all loyal and efficient employees. Moreover, we will prove that Mr. Cole's retention in employment is clearly consistent with the interests of the national security.

I humbly submit that these factors, together with the invalidity of the procedure used concerning Mr. Cole's suspension of November 25, 1953, lends itself to your consideration and I humbly submit that in the interests of fairness and justice that Mr. Cole be given an opportunity to clear his name.

Very truly yours,

DAVID I. SHAPIRO.

DIS:DS

CC:

MR. HAROLD B. SIEGEL
Assistant to the General Counsel
Department of Health, Education and Welfare
Washington 25, D. C.

Exhibit 13, Annexed to Amended Complaint

Department of

HEALTH, EDUCATION AND WELFARE

Washington

Zone 25

Feb 24 1954

Dear Mr. Shapiro:

I have your letter of February 10, 1954, which appears to be a request for a reconsideration of the denial of the request for reopening the case of Kendrick M. Cole, whose separation was directed pursuant to the provisions of Executive Order 10450 and the Security Regulations of this Department.

The substantive information contained in your letter of February 10 was considered at the time of the determination. The separation of Mr. Cole was accomplished, as indicated above, in accordance with Executive Order 10450 and the security regulations of this Department. The validity and constitutionality of that Executive Order and the constitutionality of the Act of August 26, 1950 (64 Stat. 476) upon which the order is in part based, are not matters to be determined by this Department.

Accordingly there is no basis to disturb the conclusions set out in my letter of February 4, 1954.

Sincerely yours,

OVETA CULP HOBBY
Secretary.

Mr. David I. Shapiro
350 Fifth Avenue
New York 1, New York

Exhibit 14, Annexed to Amended Complaint

In your reply refer to
File. R2:RBu:ett
and date of this letter

UNITED STATES CIVIL SERVICE COMMISSION

SECOND UNITED STATES CIVIL SERVICE REGION

Comprising the States of New York and New Jersey

Office of the Director, New York 14, N. Y.

March 3, 1954

Dickstein and Shapiro
Empire State Building
350 Fifth Avenue
New York 1, New York

Dear Sirs:

We are referring to your letter of February 25, 1954, transmitting the appeal of Kendrick M. Cole under the provisions of Section 14 of the Veterans' Preference Act and the Commission's regulations established thereunder, from the adverse decisions of the Department of Health, Education and Welfare. The supporting documents you submitted show that Mr. Cole was adversely affected by decisions made by the agency in accordance with the provisions of Executive Order 10450.

This Executive Order provides that the provisions of Public Law 733, 81st Congress, the Act of August 26, 1950, shall apply to all other departments and agencies of the government as well as those specified in the Public Law. In effect, adverse actions made under Executive Order 10450 are made under the authority of Public Law 733.

The Commission has held that the provisions of Section 14 of the Veterans' Preference Act of 1944 are not applicable to suspensions or terminations of preference civilian officers or employees by the various departments and agencies concerned under authority of Public Law 733. Accordingly, there is no right of appeal by a preference eligible to the Commission under Section 14 from an adverse action initiated under Executive Order 10450. We must respectfully decline therefore to accept Mr. Cole's appeal.

Ye may request reconsideration of this decision and submit evidence and representations in support of your request. In lieu thereof, you may appeal further to the Commissioners, U. S. Civil Service Commission, Washington 25, D. C. In either case, appeal must be made within seven (7) days after the date you receive this letter.

Sincerely yours,

JAMES E. ROSSELL
James E. Rossell
Regional Director

Exhibit 15, Annexed to Amended Complaint

Address Only
"Civil Service Commission"
In Your Reply Refer to
File BAR:McB:rlb
and Date of This Letter

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

May 5, 1954

Messrs. Dickstein and Shapiro
Attorneys at Law
350 Fifth Avenue
New York 1, New York

Dear Sirs:

This is in reply to your appeal from the decision of the Director, Second U. S. Civil Service Region, that the case of Kendrick M. Cole is not within the purview of Section 14 of the Veterans' Preference Act of 1944.

The decision of the Regional Director as stated in the letter addressed to you on March 3, 1954, has been reviewed in conjunction with the representations you have submitted in Mr. Cole's behalf. Your attention is invited to Section 1 of Executive Order 10450, which reads: "In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government," and to the first proviso of the Act of August 26, 1950 (Public Law 733, 81st Congress) which reads: "That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be

notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final."

In view of these provisions, and of the circumstances of Mr. Cole's case, this office can take no other action but to affirm the decision previously communicated to you by the Regional Office.

For the Commissioners:

Received May 6, 1954

Sincerely yours,

JOHN E. BLANN
John E. Blann, Chairman
Board of Appeals and Review

Answer

(Filed August 30, 1954)

Defendants answer the allegations of the complaint as follows:

First Defense

1. Defendants deny the allegations of paragraph First of the complaint.

2. Defendants deny the allegations of pargraph Second of the complaint.

3. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Third of the complaint.

4. Defendants admit the allegations of paragraph Fourth of the complaint.

5. Defendants admit the allegations of paragraph Fifth of the complaint.

6. Defendants admit the allegations in paragraph Sixth of the complaint.

7. Defendants admit that during said investigation plaintiff was asked questions concerning his attitude, associations and friends, but deny that during said investigation or at any other time plaintiff was asked questions concerning his politics or the politics of any other individual.

Defendants further deny the authenticity of Exhibit 1, attached to the complaint, not only as to its contents, but as it purports to be a transcript of plaintiff's interview by

Messrs. Barry and Cole. Defendants allege that no transcript of said interview was taken and that the aforementioned Exhibit 1 represents merely plaintiff's recollection of the said interview.

Except as herein admitted, the defendants deny each and every allegation contained in paragraph Seventh of the complaint.

8. Defendants admit the allegations contained in paragraph Eighth of the complaint.

9. Defendants admit the allegations contained in paragraph Ninth of the complaint.

10. Defendants admit the allegations of paragraph Tenth of the complaint.

11. Defendants admit the allegations of paragraph Eleventh of the complaint.

12. Defendants admit the allegations of paragraph Twelfth of the complaint, including the allegation that the letter of January 15, 1954, Exhibit 6, attached to the complaint, did not inform plaintiff of a right to appeal to the United States Civil Service Commission, but defendants deny plaintiff was entitled to such an appeal in an Executive Order 10450 proceeding and further deny any allegation which implies such a right.

13. Defendants admit the allegations of paragraph Thirteenth of the complaint.

14. Defendants admit the allegations of paragraph Fourteenth of the complaint.

15. Defendants admit the allegations of paragraph Fifteenth of the complaint, including the allegation that the

letter of February 4, 1954, Exhibit 11, attached to the complaint, did not advise plaintiff of a right of appeal to the United States Civil Service Commission, but defendants deny plaintiff was entitled to such an appeal in an Executive Order 10450 proceeding and further deny any allegation which implies such a right.

16. Defendants admit that on or about February 10, 1954, plaintiff wrote a letter to defendant Hobby, a copy of which is attached to the complaint as Exhibit 12, but defendants deny each and every other allegation contained in paragraph Sixteenth of the complaint.

17. Defendants admit the allegations of paragraph Seventeenth of the complaint, including the allegation that the letter of February 24, 1954 from defendant Hobby, plaintiff's Exhibit 13, attached to the complaint, did not advise plaintiff of a right to appeal to the United States Civil Service Commission, but defendants deny plaintiff was entitled to such an appeal in an Executive Order 10450 proceeding and further deny any allegation which implies such a right.

18. Defendants admit the allegations of paragraph Eighteenth of the complaint.

19. Defendants admit the allegations of paragraph Nineteenth of the complaint.

20. Defendants admit the allegations of paragraph Twentieth of the complaint.

21. Defendants admit the allegations of paragraph Twenty-first of the complaint.

22. Defendants admit the allegations of paragraph Twenty-second of the complaint.

Answer

23. Defendants deny the allegations of paragraph Twenty-third of the complaint, except defendants admit that the plaintiff, in his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York, had no access to any secrets of the Government of the United States, or "classified" material, and was not in a position to influence policy against the interests of the Government of the United States.

24. Defendants deny the allegations of paragraph Twenty-fourth of the complaint.

25. Defendants deny the allegations of paragraph Twenty-fifth of the complaint.

26. Defendants deny the allegations of paragraph Twenty-sixth of the complaint.

27. Defendants deny the allegations of paragraph Twenty-seventh of the complaint.

28. Defendants admit the allegations of paragraph Twenty-eighth of the complaint.

29. Defendants deny the allegations of paragraph Twenty-ninth of the complaint.

30. Defendants admit that there are not now any administrative procedures available to the plaintiff, but the defendants deny that the plaintiff timely exhausted all remedies previously available to him under the applicable administrative procedures in that plaintiff was advised by letter dated November 25, 1953, annexed to the complaint as Exhibit 3, of his right to a hearing if requested within thirty days from the receipt of said letter, however, no request for a hearing was made by the plaintiff until January 27, 1954, Exhibit 7, attached to the complaint, which

was over two months after the aforementioned letter of November 25, 1953, and twelve days after notification to the plaintiff of his termination and seven days subsequent to the effective date of said termination.

Except as herein admitted, the defendants deny each and every allegation contained in paragraph Thirtieth of the complaint.

31. Defendants deny the allegations of paragraph Thirty-first of the complaint.

32. Defendants allege that they were without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Thirty-second of the complaint.

SECOND DEFENSE

The complaint does not present a justiciable controversy over which the Court has jurisdiction.

THIRD DEFENSE

The Court is without jurisdiction of the subject matter of this action in that plaintiff seeks to subject to judicial review executive action which is committed by law to the sole and exclusive discretion of the executive.

FOURTH DEFENSE

The Court is without jurisdiction in that the action of the defendants complained of in this action were in compliance with the applicable statutes and were neither arbitrary, capricious, or an abuse of discretion.

FIFTH DEFENSE

Plaintiff's removal was in all respects in compliance with the Constitution, applicable statutes, and in the national interest.

SIXTH DEFENSE

Plaintiff's failure to avail himself of the opportunity to obtain an administrative hearing precludes this Court from granting relief.

SEVENTH DEFENSE

The complaint fails to state a cause of action against defendant Young, Chairman of the United States Civil Service Commission, in view of plaintiff's failure to join as party defendants, Commissioners Lawton and Moore, both of whom are indispensable to this action.

EIGHTH DEFENSE

The Court has no jurisdiction to entertain the petition because it is in effect a suit against the United States to which it has not consented.

NINTH DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants pray that the complaint be dismissed in all respects with costs to the defendants.

WARREN E. BURGER
Assistant Attorney General
LEO A. ROVER
United States Attorney
EDWARD H. HICKEY
Attorney, Department of Justice
DONALD B. MACGUINEAS
Attorney, Department of Justice
ANDREW P. VANCE
Attorney, Department of Justice
Attorneys for Defendants

* * *

Plaintiff's Motion for Judgment on the Pleadings

(Filed September 10, 1954.)

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, plaintiff moves the Court to enter judgment on the pleadings in favor of plaintiff herein on the ground that plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

As grounds for the motion, plaintiff states that it appears clearly from the complaint and answer that plaintiff was dismissed from government employment on the basis of a finding that his retention in employment was not clearly consistent with the interests of national security, which was made in violation of Section 14 of the Veterans Preference Act (5 United States Code, Section 863) and Public Law 733 (5 United States Code, Section 22-1, *et seq.*).

Plaintiff's memorandum of points and authorities in support of the instant motion is attached hereto captioned as "Plaintiff's Memorandum of Law."

Respectfully submitted,

JAMES H. HELLER,
DAVID I. SHAPIRO,
Attorneys for Plaintiff.

Defendants' Cross-Motion for Judgment on the Pleadings

(Filed October 8, 1954)

Pursuant to Rule 12c of the Federal Rules of Civil Procedure, defendants move the Court to enter judgment on the pleadings in favor of the defendants herein on the ground that defendants are entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

As grounds for the motion, defendants state that it is apparent from the complaint and answer that plaintiff was dismissed from government employment on the basis of a finding that his retention in employment was not clearly consistent with the interest of national security; plaintiff failed to avail himself of the opportunity to obtain an administrative hearing; and the actions of the defendants complained of in this action were in compliance with the applicable statute.

In support of this motion, the Court is respectfully referred to the pleadings and exhibits on file and the attached memorandum of points and authorities in opposition to plaintiff's motion for judgment on the pleadings and in support of defendants' motion for judgment on the pleadings.

WARREN E. BURGER
Assistant Attorney General

LEO A. ROVER
United States Attorney

EDWARD H. HICKEY
DONALD B. MACGUINEAS

ANDREW P. VANCE
Attorneys, Department of Justice

Attorneys for Defendants

Opinion

(Filed October 26, 1954)

James H. Heller, Esq., of Washington, D. C., and David I. Shapiro, of New York, N. Y., for the plaintiff.

Donald B. MacGuineas, Attorney, Department of Justice, of Washington, D. C., for the defendants.

The plaintiff in this action challenges the legality of the procedure for the removal of Government employees in the interest of national security.

The plaintiff was a Food and Drug Inspector, employed by the Food and Drug Administration of the Department of Health, Education and Welfare. Pursuant to the applicable statute and Executive Order, which are hereafter referred to in greater detail, after an interview in which he was interrogated at length, he was served with charges to the effect that he established and continued a close association with individuals reliably reported to be Communists, and maintained a continued and sympathetic association with an organization which was included in the Attorney General's list of subversive groups. He was accorded an opportunity to submit an answer, but declined to do so. The proceedings concluded with a termination of his services by the head of the Department, on the ground that his continued employment was not clearly consistent with the interests of national security.

The plaintiff brings this action to secure reinstatement to his position, claiming that the Executive Order, pursuant to which he was removed, was invalid and that the procedure followed in severing his connection with the Government was not in accordance with law. The pertinent facts are not in dispute and are set forth in the pleadings.

Both sides moved for judgment on the pleadings, and the case came on for a hearing on these cross-motions.

The basic statute, under which the plaintiff was removed from office, is the Act of August 26, 1950 (64 Stat. 476; 5 U. S. C. A. 22-1). Its pertinent portions read as follows:

> "*Notwithstanding the provisions of section 652* of this title, *or the provisions of any other law*, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, *in his absolute discretion and when deemed necessary in the interest of national security*, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services; * * * " (Emphasis supplied.)

The statute prescribes the procedure to be followed in notifying the employee of the reasons for his suspension and giving him an opportunity to submit statements and affidavits in opposition within 30 days after such notification. It further provides for a hearing, then for a review of the case by the agency head or some official designated by him, and finally for a written statement of the decision

of the agency head, whose determination was to be final. The statute concludes (5 U. S. C. A. 22-3) as follows:

> "The provisions of sections 22-1 to 22-3 of this title shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. * * * "

To summarize succinctly the pertinent provisions of the Act, it empowers the heads of the specified Government departments and agencies in their absolute discretion and when deemed necessary in the interests of national security, to suspend any officer or employee of that department or agency, and then, after completion of the specified procedure, to remove him from office. The President is authorized to extend the statute to such other departments and agencies as he may deem necessary in the best interests of national security.

Acting pursuant to this authority, the President on April 27, 1953, issued Executive Order No. 10450, which extended the provisions of the Act "to all other departments and agencies of the Government". This direction is preceded by a recital that the President deemed such action necessary in the best interests of national security. An examination of this Executive Order and its comparison with the statute, inescapably lead to the conclusion that the Order is within the orbit of the Act of Congress. The statute authorized the President to extend it to such other departments and agencies as he might from time to time deem necessary in the best interests of national security. On the basis of a finding that he deemed such action necessary in the best interests of national security, he extended the provisions of the Act to all other departments and agencies of the Government, that is to all departments and agen-

cies of the executive branch of the Government in addition to those enumerated in the Act. This he had the power to do under the very terms of the statute.

It must be recalled that Article II, Section 1, of the Constitution provides that "the executive Power shall be vested in a President of the United States of America". Section 3 of Article II, provides that, "he shall take Care that the Laws be faithfully executed". Under the authority vested in him by these two provisions, the President is empowered to remove in his own discretion any officer or employee of the Executive branch of the Government whom he or any of his predecessors has appointed.[1] The head of an executive department or agency may pursue a similar course as to the employees appointed by him or his predecessors, except to the extent that this power is limited by an Act of Congress. In the early years of the Republic it was not customary to remove Government officers or employees, but it was assumed that they would continue in their positions indefinitely. In fact, history records that President Thomas Jefferson in reply to an importunity for an appointment to office, replied that there were no vacancies because "few die and none resign". With the advent of President Andrew Jackson, the policy of the Government radically changed. From that time on, it was customary for an incoming administration to make numerous changes in the personnel of Government departments and agencies purely for political reasons and for purposes of patronage. Holding political views contrary to those of the administration in power was considered sufficient ground for removal from office. As the complexities of Government increased, the realization gradually grew that the development of a

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[1] *Myers* v. *United States*, 272 U. S. 52. An exception has been developed in respect to members of administrative commissions on the ground that they are quasi-administrative and quasi-judicial, *Humphrey's Executor* v. *United States*, 295 U. S. 602.

career service was necessary both from the point of view of efficiency and from the standpoint of justice to individual employees. The result was the enactment of the Civil Service Act, which provided that no one within a group of employees known as the Classified Civil Service, should be subject to removal except on charges, or in case of a reduction in force (5 U. S. C. A. 652). Later the Veterans' Preference Act was passed. It barred the removal of any Government officer or employee who was a war veteran, except under certain specified conditions (5 U. S. C. A. 851, 861, 863). As the two World Wars created several million veterans, the result has been that the vast majority of Government employees have at least a partial security of tenure and are protected from dismissal except under certain specified conditions, either by virtue of the Civil Service Act or the Veterans' Preference Act, or both. It must be emphasized, however, that except as otherwise provided by Act of Congress, every Government employee is subject to removal from office at the will of the Executive.

The Act of August 26, 1950 (5 U. S. C. A. 22-1) is in effect a limitation on the Civil Service Act and the Veterans' Preference Act, and withdraws the protection of these two statutes or any other Act of Congress from any officer or employee whose removal is deemed necessary in the interests of national security. This conclusion is rendered clear beyond peradventure of a doubt by the emphatic introductory clause reading: "Notwithstanding the provisions of section 652 of this title [i.e., the Civil Service Act] or the provisions of any other law [i.e., the Veterans' Preference Act], * * *" Consequently under the Act of 1950, as extended by Executive Order to other Government departments and agencies, any officer or employee of the Executive branch of the Government is subject to removal in the absolute discretion of the head of his department or agency, when deemed necessary in the interests of

national security. The rights of the officer or employee in question are safeguarded by requiring the head of the agency to follow a specified procedure before the removal becomes final.

We may now proceed to a consideration of the specific objections raised by the plaintiff to the legality of the action of which he complains. First, it is urged that the Act of August 26, 1950, should be construed as being limited to those employees who are "security risks" and as not applicable to employees charged with disloyalty, as was true of the plaintiff. There is manifestly no basis for this contention in the plain, unambiguous wording of the statute. The Act does not refer either to employees who are disloyal, or to employees who are security risks. It authorizes the removal of any employee "when deemed necessary in the best interests of the national security". Obviously, this comprehensive phraseology is broad enough to cover both disloyal employees and employees who are security risks. The statute makes no distinction between the two.

Plaintiff's counsel seek to support their argument by recourse to the Committee reports concerning this legislation (S. Rept. No. 2158 and H. Rept. No. 2330, 81st Cong. 2d Sess., U. S. Code Congressional Service, 1950, Vol. 2, pp. 3278 *et seq.*). It is, of course, the duty of the courts in construing and applying a statute to endeavor to ascertain the intent of the legislative body. If the phraseology of the Act is obscure or ambiguous, the Committee reports are the primary source to which recourse should be had in order to determine the intent of the Congress. If the language of the statute is clear, however, such resort is not necessary. Even if, however, the Committee reports are consulted in this instance, it will be found that they do not sustain the plaintiff's contention. On the contrary, they seem to support the Government's theory that the intent of the Congress was twofold: first, to supply legislative au-

thority for a prior Executive Order issued by the President creating a procedure for the removal of disloyal employees; and second, to extend the power of the President in order to cover employees who are security risks, though not disloyal. Both classes of employees are mentioned in the Committee reports. The Reports state that it is intended that the President's loyalty program should be continued and that the bill was concerned further with the problem of dealing with those Federal employees, who, although loyal, are so careless as to jeopardize the national security.

The construction of the Act urged by the plaintiff would lead to an absurd result. Its effect would be to create legislative authority for the removal of employees who are security risks, but not employees who are disloyal. Manifestly, such an illogical outcome could not have been within the contemplation of the Congress. Counsel for the plaintiff seem to be laboring under the notion, which the court deems fallacious, that a disloyal employee constitutes a danger to internal security only if he holds what is denominated as a sensitive position, namely, a position in which he has access to secret information or secret documents. This is far too limited a view of the potential danger from disloyal employees. For example, conceivably it is within the realm of possible contemplation that an employee connected with public water works is in a position in time of emergency to do something that may harm the water supply of the community. Likewise, the actions of a disloyal Food and Drug Inspector may impair the public health. Examples might be multiplied *ad infinitum.* In fact the Committee Reports unequivocally state that "Disloyal persons should not be permitted to be employed in the Federal service under any circumstances. They are not entitled to Federal employment of any kind."

It is further argued that the Executive Order of the President is beyond the scope of the statute because instead of enumerating by name the specific agencies that are deemed sensitive, the Order extends the provisions of the Act of 1950 to all Government departments and agencies without referring to them by title. Obviously, if the Executive Order listed every Government agency separately, this objection would have no foundation. Surely, the action of the President in blanketing all Government departments and agencies under the Act in so many words, instead of listing each of them, one by one, does not contravene the power conferred upon him. It must be noted in this connection that the Executive Order contains an express finding that "the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; * * * "

Again it is further contended in behalf of the plaintiff that the Executive Order transgresses the Veterans' Preference Act, in that it does not provide for the procedure prescribed in that statute. Obviously, however, the Act of 1950, which was enacted subsequently to the Veterans' Preference Act, supersedes the latter *pro tanto* insofar as the two are inconsistent. The Act of 1950 created an exception from the Veterans' Preference Act for the employees covered by the latter, as has already been explained.

It is finally objected in behalf of the plaintiff that the procedure prescribed in *Mulligan* v. *Andrews*, 211 F. (2d) 28, was not followed. That case, however, was decided under the Veterans' Preference Act and, therefore, is not applicable here.

The court concludes that Executive Order 10450 is valid and that the removal of the plaintiff from office is not subject to attack.

Order

The plaintiff's motion for judgment on the pleadings is denied. The motion of the defendants for judgment on the pleadings is granted.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

October 26, 1954.

Order

(Filed November 12, 1954)

This cause having come before the Court on plaintiff's and defendants' cross motions for judgment on the pleadings, and it appearing that, in accordance with the opinion of the court rendered in this case on October 26, 1954, that the complaint as amended fails to state a claim upon which any relief can be granted;

IT IS HEREBY ORDERED that plaintiff's motion for judgment on the pleadings be and it hereby is denied; defendants' motion for judgment on the pleadings be and it hereby is granted; and the complaint as amended be and hereby is dismissed.

ALEXANDER HOLTZOFF,
District Judge.

Dated: November 12, 1954.

Notice of Appeal

(Filed January 5, 1955)

Notice is hereby given that Kendrick M. Cole, plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered herein on November 12, 1954, denying plaintiff's motion for judgment on the pleadings, granting the defendants' motion for judgment on the pleadings, and dismissing the amended complaint.

JAMES H. HELLER
James H. Heller
Attorney for Plaintiff-Appellant,
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1026 Woodward Building
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UNITED STATES COURT OF APPEALS

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12526

KENDRICK M. COLE, Appellant,

v.

PHILIP YOUNG, Chairman, United States Civil Service Commission, et al., Appellees

Appeal from the United States District Court for the District of Columbia

OPINION—Decided July 28, 1955

Mr. David I. Shapiro, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom Mr. James H. Heller was on the brief, for appellant. Mrs. Helen M. Rosenthal also entered an appearance for appellant.

Mr. Donald B. MacGuineas, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of Court, with whom Mr. Samuel D. Slade, Attorney, Department of Justice, was on the brief, for appellees. Mr. John D. Lane, Assistant United States Attorney, also entered an appearance for appellees.

Before Edgerton, Prettyman and Bastian, Circuit Judges

PRETTYMAN, Circuit Judge:

Appellant Cole was a five-point veterans' preference eligible employed in the classified Civil Service as a food and drug inspector in the Department of Health, Education and Welfare. After an investigation pursuant to Executive Order 10450[1] he received a written statement of charges, which were, generally speaking, that he had continued in close association with individuals reliably reported to be Communists and had donated to and attended

[1] 3 C. F. R. 72 (Supp. 1953).

meetings of an organization designated by the Attorney General under Section 12 of the Executive Order. He replied to this letter, declining to make any explanation of the charges, saying that the request of the Government was an invasion of his private rights and of his right of freedom of association. His letter was forwarded to the Secretary, who ordered that his employment be terminated. Some two weeks later Cole, by his counsel, wrote the Secretary, asking a reopening of the case and stating that if it were reopened he would prove that he had not knowingly had the associations or relations which were alleged. The Secretary denied the reopening and later denied a second request for a reopening. Cole appealed to the Civil Service Commission under Section 14 of the Veterans' Preference Act,[2] but the Director would not accept the appeal. The Commission approved the Director's decision, holding that Act not applicable to dismissals under Public Law 733.[3] Thereupon Cole filed a civil action in the District Court, praying for a declaratory judgment and for an order restoring him to his position. The District Court, with an exhaustive opinion,[4] granted the defendants' motion for judgment on the pleadings, dismissing the complaint for failure to state a claim upon which relief could be granted.

Upon his appeal to this court Cole makes three principal points, and the Government makes one additional point, which it raised in its motion for judgment on the pleadings. It says Cole failed to exhaust his administrative remedy and so his action in court must fail. While Cole failed to pursue the administrative remedy offered him—he affirmatively rejected it—nevertheless the administrative process was exhausted and a final administrative decision was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken.

Cole's first point is that the President could not extend the summary dismissal provisions of Public Law 733 to employees holding non-sensitive, non-policy making posi-

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[2] 58 Stat. 390 (1944), as amended, 5 U. S. C. A. § 863.

[3] 64 Stat. 476 (1950), 5 U. S. C. A. § 22—1 *et seq.*

[4] Cole v. Young, 125 F. Supp. 284 (1954).

tions in a Department such as Health, Education and Welfare. He makes an extensive argument based upon the congressional debates and several writings in the field, plus a rationalization of the purposes of such a statute. The trouble with the argument is that the statute itself is explicit on the point. It provides:

> "Sec. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."[5]

The statute puts the selection of the agencies to be affected in the hands of the President. It says nothing about sensitiveness or policy-making. The basic provision of the statute (Section 1) applies in terms to "any civilian officer or employee" in the named departments and agencies. When the President, under Section 3, *supra*, makes the statute applicable to other departments, he makes the "any civilian" provision applicable.

The foregoing is entirely constitutional. The Constitution vests all executive power in one person, the President. It provides:[6] "The executive Power shall be vested in a President of the United States." His is a lone, personal responsibility in so far as carrying out the laws which Congress has enacted is concerned. The business of the Congress is to make laws. The business of the President is to carry them out. Authority is ordinarily a concomitant of responsibility. But we need not here venture into the intricacies of executive-legislative relationship in respect to executive employees. It is enough to say that, when the Congress recites that the President may dismiss summarily executive employees whenever he deems dismissal necessary or advisable in the interest of the national security, the enactment is valid. The policies to be pursued in the matter by the Congress and by the President are for them to determine, not for us.

Cole's second point is that Public Law 733 at most authorizes summary dismissal when such termination of

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[5] 64 Stat. 477 (1950), 5 U. S. C. A. § 22—3.

[6] Art. II, § 1, cl. 1.

employment is "necessary or advisable in the interest of the national security", while Executive Order 10450 requires agency heads to insure that the retention of any employee "is clearly consistent with the interests of the national security." He says the latter quoted clause is not within the former and, therefore, the Order is not within the statute. But we think the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute; and this is quite apart from the consideration that the President may have such power (to dismiss executive employees whose retention he deems not clearly consistent with the national security) as a part of the direct constitutional grant of "executive power". There is a line somewhere beyond which Congress cannot go in enacting prescriptions in respect to executive power over executive employees. It might be, for example, that if Congress required the hiring of executive personnel whose employment the President deemed not consistent with the national security, the enactment would be void. Congress has the power to make the laws and so can make laws concerning Government employ; but the President has the power, and so the responsibility, of carrying out all the laws, and Congress cannot impinge upon that power. There is a boundary between the two powers. We do not have that problem in our view of the case. We advert to it because of the view expressed by our dissenting judge. If we were of his view and thought the President's Order inconsistent with the act of the Congress, we would have to decide the constitutional question thus presented.

Cole seems to argue that, since the statute places the discretion in the "agency head", the President had no power to issue an Order upon the subject. In the first place, this is an executive matter and, if Congress had meant to prohibit the President from acting in respect to it, a serious question as to the validity of its act would arise. As we have already said, the Constitution vests

the executive power in the President. In the second place, Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the enactment. In the third place, Cole's argument in its ultimate essence is that the action of the agency head in the case at bar was void; thus the argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a superior. That position is untenable on its face. The President surely has the right to lay down the lines within which his subordinates shall exercise discretions confided in them, and their operation within such lines is valid, not void. Perhaps if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here.

Cole's third point is that his notice of dismissal was not the required "written statement of the decision of the agency head". Public Law 733 provides that an employee proposed for suspension "shall be notified of the reasons for his suspension". Cole does not, and could not, complain about the sufficiency of the statement given him at this point. Then the statute provides that an employee proposed for dismissal shall receive five things, the first of which is a statement of the charges against him and the last a written statement of the decision of the agency head. Cole does not claim he did not get a written statement of the charges against him or that the statement given him was inadequate. His claim is that the letter of the Secretary which advised him his employment had been ordered terminated, "based on the study of all the documents in your case, including your reply to reference letter", was not a compliance with the statute as above quoted.

We are all familiar with the difference between "opinions" and "decisions" in judicial matters. "Opinions" state the reasons, and "decisions" merely state the actions taken. The statute here used a well-known word, and we give it its well-known meaning.

Cole claims the applicability of *Mulligan* v. *Andrews*,[7] but the statute there involved required a statement of the "reasons" for removal. The statute now before us does not so provide in respect to the final step in a termination of employment.

The judgment of the District Court dismissing the complaint is

Affirmed.

EDGERTON, *Circuit Judge, dissenting:* As we held a year ago, enforcing the Lloyd-LaFollette Act's requirement that "No person in the classified civil service of the United States shall be removed" without notice and reasons in writing: "The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear." *Roth* v. *Brownell*, — U.S. App. D.C. —, —, 215 F. 2d 500, 502. It does not follow, of course, that Congress could impose absurd and crippling limits. But this is irrelevant here.

In the Lloyd-LaFollette Act and the Veterans' Preference Act, Congress limited the President's control over removals. No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations. 64 Stat. 476, 5 U.S.C. §§ 22-1, 22-3. The question is whether this case is within the exceptions. I think it is not, for three reasons.

1. The exceptions do not cover the Food and Drug Administration, in which the appellant was employed.

The Act of 1950 provides in § 1: "Notwithstanding the provisions of section 652 of this title [Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee. . . ." Sec-

[7] 93 U. S. App. D. C. 375, 211 F. 2d 28 (D. C. Cir. 1954).

tion 1 also provides that a suspended employee may be dismissed if the agency head thinks it "necessary or advisable in the interest of the national security". Section 3 provides that the Act "shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."

In Executive Order No. 10450 the President, ostensibly "deeming such action necessary in the best interests of the national security", undertook to extend the Act to "all other departments and agencies of the Government". I think this blanket extension unauthorized and invalid. Congress had specified some agencies that have something to do with national security. Committee reports describe them as "sensitive" or "concerned with vital matters" affecting national security. H. R. Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950); S. Rep. No. 2158, 81st Cong., 2d Sess. 2 (1950); S. Rep. No. 2264, 80th Cong., 2d Sess. 2 (1948). Evidently Congress thought some other agencies might likewise be concerned with national security. Accordingly Congress authorized the President to extend the Act. There is, I think, not the slightest reason for supposing that Congress intended to authorize the blanketing in of all agencies. A committee report said: "the bill makes ample provision for the employment in nonsensitive agencies of certain of those employees who may be classified in sensitive departments and agencies as security risks." H. R. Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950). Accordingly Section 1 of the Act provides "That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government . . . ." Since many agencies, including the Food and Drug Administration in the Department of Health, Education and Welfare, in which the appellant was employed, have nothing to do with national security, the Act of 1950 has nothing to do with them. The authorization to bring "other" departments and agencies within the Act should be recognized, in accordance with the purpose and intent of Congress, as limited to those that might reasonably be deemed "necessary in the best interests of national security." It could not reasonably be deemed necessary in

the best interests of national security that employees in all agencies, including not only the Food and Drug Administration but the Fish and Wildlife Service, be subject to summary unappealable dismissal.

The Supreme Court has said regarding the "plain meaning" of an Act of Congress: "When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

2. The Act of 1950 authorizes the head of an agency covered by the Act to dismiss suspended employees "whenever he shall determine such termination necessary or advisable in the interests of the national security". Appellant's agency head did not make that determination concerning the appellant, but determined only that appellant's continued employment "is not clearly consistent with the interests of national security". In Executive Order 10450 the President purported to adopt the "clearly consistent" test, but he had no authority to adopt it. It differs vitally from the "necessary or advisable" test that Congress prescribed.

The difference is closely parallel to that between the test, "reasonable grounds exist for belief that the person involved is disloyal", used in Executive Order 9835, and the test, "There is a reasonable doubt as to the loyalty of the person involved", used in the later Executive Order 10241. As this court has held, that "amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal,' does cause a reasonable doubt as to whether he is in fact loyal." *Jason* v. *Summerfield*, — U. S. App. D. C. —, —, 214 F. 2d 273, 276, *cert. denied*, 348 U.S. 840.[1] Just so here, the amended

[1] The court found the difference so essential that employees who had been cleared under the old standard might be reexamined and dismissed under the new one.

standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is "necessary or advisable in the interests of national security", does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-Lafollette Act and the Veterans' Preference Act.

3. The procedure used in appellant's dismissal does not even comply with the Act of 1950. Even that Act requires "a written statement of the decision of the agency head". Frequently, in legal connections, "decision" means not only a result but the reasons for the result.[2] The Administrative Procedure Act follows this usage. It requires that "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Sec. 8(b); 60 Stat. 242, 5 U.S.C. § 1007(b). The letter telling appellant he was dismissed, but not telling him why, was evidently not "a written statement of the decision" as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given no safeguard is provided. *Cf. Mulligan* v. *Andrews*, 93 U.S. App. D. C. 375, 211 F. 2d 28.

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[2] One of the definitions of "decision" in Webster is "an account or report of a conclusion, especially of a legal adjudication or judicial determination of a question or cause; as, a *decision* of the Supreme Court." One of the definitions in the Century is ". . . final judgment or opinion in a case which has been under deliberation or discussion; as, the *decision* of the Supreme Court."

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1955

No. 12,526

KENDRICK M. COLE, Appellant,

v.

PHILIP YOUNG, Chairman, United States Civil Service Commission, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Prettyman and Bastian, Circuit Judges

JUDGMENT—July 28, 1955

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: July 28, 1955.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Edgerton.

Designation of Record (omitted in printing).

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, Petitioner,

vs.

PHILIP YOUNG, et al.

ORDER OF SUBSTITUTION—November 21, 1955

On Consideration of the motion of counsel for petitioner to substitute Marion B. Folsom, present Secretary of Health, Education, and Welfare, as a party respondent in this case in the place and stead of Oveta Culp Hobby, resigned,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, Petitioner,

vs.

PHILIP YOUNG, et al.

ORDER ALLOWING CERTIORARI—Filed November 21, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 442

KENDRICK M. COLE,

Petitioner,

v.

PHILIP YOUNG, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Supreme Court of the United States

October Term, 1955

No.

KENDRICK M. COLE,

Petitioner,

v.

PHILIP YOUNG, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Kendrick M. Cole, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on July 28, 1955, which affirmed the judgment of the District Court of the District of Columbia entered on October 26, 1954 granting respondents' motion for judgment on the pleadings and dismissing petitioner's amended complaint.

Opinions Below

The opinions of the Court of Appeals, *i.e.*, the majority opinion of Judge Prettyman and the dissenting opinion of Judge Edgerton, have not been officially reported but are set out in Appendix "C", *infra*, pp. 39-49. The opinion

of the District Court (J. A.[1] 44-53), is reported at 125 F. Supp. 284.

Jurisdiction

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 66). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254.

Questions Presented

1. Could Executive Order 10450 validly deprive petitioner of his right to appeal his discharge from Federal employment as a "security risk" to the United States Civil Service Commission under Section 14 of the Veterans Preference Act where it is conceded that he is a loyal employee holding a non-sensitive, non-policy-making position as a Food & Drug Inspector in the Department of Health, Education and Welfare?

2. Is Executive Order 10450's standard of employee discharge (discharge mandatory unless retention is "clearly consistent with the interests of national security") consistent with the standard of employee discharge established by the Act of August 26, 1950 (discharge discretionary whenever "necessary or advisable in the interest of the national security") so as to cut off petitioner's rights under the Veterans Preference and Lloyd-LaFollette Acts?

3. The Act of August 26, 1950 vests discretion in "Agency Heads" to suspend and remove Federal employees where "necessary in the interest of national security." Does Executive Order 10450, by requiring the dismissal of all federal employees whose employment is

[1] The letters "J. A." as used throughout refer to the Joint Appendix as printed for the use of the court below.

not found to be "clearly consistent with the interests of the national security," invalidly preclude the exercise of such discretion on the part of "Agency Heads?"

4. Was the Agency Head's letter of January 15, 1954 terminating petitioner's employment as "not clearly consistent with the interests of national security," a "written statement of the decision of the Agency Head" as required by Section 1 of the Act of August 26, 1950?

Statutory Provisions and Executive Orders Involved

The statutes involved are the Act of August 26, 1950, c. 803, 64 Stat. 476, 5 U. S. C. Sections 22-1 through 22-3, hereafter generally referred to as the "Act of August 26, 1950;" Section 14 of the Veterans Preference Act of 1944, the Act of June 27, 1944, c. 287, Section 14, 58 Stat. 390, amended August 4, 1947, c. 447, 61 Stat. 723, 5 U. S. C., Section 863, hereafter generally referred to as "The Veterans Preference Act;" Section 6(a) of the Lloyd-LaFollette Act, the Act of August 24, 1912, Section 6, 37 Stat. 555, amended June 10, 1948, c. 447, 62 Stat. 354, 5 U. S. C. Section 652(a), hereafter generally referred to as "The Lloyd-LaFollette Act." The Executive Order involved is No. 10450, April 29, 1953, 18 F. R. 2489, as amended by Executive Orders No. 10491, October 16, 1953, 18 F. R. 6583; No. 10531, May 28, 1954, 19 F. R. 3069; No. 10548, August 3, 1954, 19 F. R. 4871; No. 10550, August 7, 1954, 19 F. R. 4981, hereafter referred to as "Executive Order 10450". The statutes and the executive order in relevant parts are set forth in Appendix "A", *infra*, pp. 24-33.

Statement of the Case

A. Petitioner

Petitioner, an honorably discharged veteran, was classified as a five-point veteran's preference eligible pursuant to Section 14 of the Veterans Preference Act of 1944 (J. A. 3, 37). Prior to his suspension on November 13, 1953, he held a position in the classified civil service as Food and Drug Inspector, Food & Drug Administration, New York District, Department of Health, Education and Welfare. It is conceded by respondents that in this position petitioner had no access to any secrets of the Government of the United States, or "classified" material, and was not in a position to influence policy against the interests of the United States (J. A. 40).

On October 20, 1953, he was requested by the Chief of Personnel Security, Department of Health, Education and Welfare, to come to Washington, D. C., in connection with an investigation regarding his retention in employment pursuant to the provisions of Executive Order 10450 which established the Government employee security program. During this investigation he was asked numerous questions about his attitude, association and friends (J. A. 3, 37).

Following this investigation, on November 13, 1953, petitioner received a notice of suspension "pending investigation under Executive Order 10450" (J. A. 3, 38). The Under Secretary of the Department of Health, Education and Welfare, by letter dated November 25, 1953, informed petitioner of the alleged reasons for his suspension and furnished him with a written statement of charges (J. A. 4, 38). The charges were:

> "1. That you established and have continued a close association with individuals reliably reported to be Communists.

"2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.

"3. That you have, by your own admission, donated funds to the Nature Friends of America.

"4. That you have contributed your services in the form of work to the Nature Friends of America.

"5. That you have attended social gatherings of the Nature Friends of America."

It was conceded by respondents in the court below that petitioner was not charged with being disloyal and that none of the charges implied any disloyalty on his part.[2]

Petitioner replied to this letter of November 25, 1953, on December 23, 1953, refusing to make any explanation of the charges since they concerned "associations which I carry on as part of my private informal social life. I consider any request by the U. S. Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of 'freedom of association'" (J. A. 4, 19, 38).

On January 15, 1954, the Secretary informed him that his termination had been ordered effective at the close of business January 20, 1954, since "based on the study of all the documents in your case, including your reply to

[2] "The charges against appellant do not imply any knowing acts of disloyalty on his part . . . " * * * As appellant correctly said, 'In the charges made against me I am not accused of . . . doing or saying anything which would indicate that I am disloyal to the Government of this country'. Accordingly, there is no basis for treating appellant as a loyalty case rather than as a security risk case." (*Appellees' Brief*, pp. 6, 17.)

reference letter, it has been determined that your continued employment in the Department of Health, Education and Welfare is not clearly consistent with the interests of national security" (J. A. 5, 21, 38).

On January 27, 1954, petitioner, by his counsel, wrote the Secretary requesting a reopening of petitioner's case and a hearing. The request was based on the ground that petitioner wrote his letter of December 23, 1953, declining to answer the charges, while recovering from an operation for an esophageal diverticulum which caused petitioner to suffer an emotional and physical unbalance (J. A. 5-6, 22-26, 38).

On January 29, 1954, petitioner, by his counsel, supplemented the letter of January 27, stating that if the case were reopened he would prove that he had not knowingly maintained any close or sympathetic association with any member of the Communist Party, that his relations with an organization known as the Nature Friends of America, which constituted four of the five charges, were at once casual, intermittent and entirely innocent, and in fact that petitioner had specifically refused to become a member of the organization and had only used its facilities for outdoor recreation (J. A. 27).

On February 4, 1954, the Secretary wrote counsel for petitioner denying his request for a reopening of his case, although she stated: "I have reviewed the information which you have forwarded in support of your request, as well as other available information" (J. A. 28). On February 10, 1954, counsel for petitioner again wrote the Secretary requesting reconsideration of the refusal to reopen. In this letter the offer of proof of January 29, 1954, was repeated and amplified. In addition, counsel pointed out the insufficiency of the original charges and questioned the constitutionality of Executive Order 10450 and the Act of August 26, 1950, U. S. C. Section 22-1, *et seq.*, on which the Executive Order was in part based (J. A. 29-31). The

Secretary denied this second request on February 24, 1954, saying "The substantive information of your letter of February 10 was considered at the time of the determination" (J. A. 32); and that the separation of Mr. Cole had been accomplished in accordance with Executive Order 10450 and the security regulations of the Department; and that the validity and constitutionality of the Executive Order and the Act of August 26, 1950 (64 Stat. 476), upon which it is based, were not matters to be determined by the Department (J. A. 8, 32, 39).

On February 25, 1954, petitioner appealed his discharge to the Second United States Civil Service Region claiming that his discharge was in violation of Section 14 of the Veterans Preference Act and the Rules and Regulations of the Civil Service Commission in that: (1) he was not furnished with any and all of the reasons for his discharge; (2) that said discharge was arbitrary, capricious and not made in good faith; (3) that no notice of any adverse determination ever advised him of his right to appeal to the Civil Service Commission; (4) that the refusal to grant him a "hearing" pursuant to the request of January 27, 1954 as supplemented, was arbitrary, capricious, and not made in good faith; (5) that the refusal to reconsider the denial of the request for the "hearing" pursuant to the request of February 10, 1954, was arbitrary, capricious and not made in good faith (J. A. 8-9, 39).

On March 3, 1954, the Regional Director advised petitioner that he could not accept his appeal inasmuch as "The Commission has held that the provisions of Section 14 of the Veterans Preference Act of 1944 are not applicable to suspension or termination of preference civilian officers or employees by the various departments and agencies concerned under authority of Public Law 733 (81st Congress, the Act of August 26, 1950). Accordingly, there is no right of appeal by a preference eligible to the Commission under Section 14 from an adverse action initiated

under Executive Order 10450" (J. A. 9, 33-34, 39). On May 5, 1954, the decision of the Regional Director was approved by the United States Civil Service Commission, to which it had been appealed (J. A. 9, 35-36, 39).

B. Court Proceedings

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring invalid his discharge by the Secretary of Health, Education and Welfare pursuant to the provisions of Executive Order 10450, and for a declaration that the refusal of respondent Young, Chairman of the United States Civil Service Commission, to hear petitioner's appeal from the Secretary's adverse determinations was illegal. Petitioner prayed further for an Order restoring him to his position as a Food and Drug Inspector as of the date of his discharge.

An answer was filed on August 30, 1954. On September 8, 1954, an Order was entered granting petitioner's motion to amend his complaint by adding as parties defendant George M. Moore and Frederick J. Lawton, members of the United States Civil Service Commission. It was stipulated by counsel that the answer which was filed was adopted by the additional defendants.

After the filing of the answer, petitioner and respondents filed cross-motions for judgment on the pleadings. On October 26, 1954, the District Court granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (J. A. 53). Jurisdiction of the cause in the District Court was based on 28 U. S. C., Sections 1331, 2201 and 2202. The Court of Appeals, by a 2-1 vote, affirmed, Judge Edgerton, dissenting (Appendix "C", *infra*, pp. 39-49).

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the Government of the United States, our democratic society, and millions of Government employees. The decision of the court below removes from Government Service as a "security risk" a concededly loyal employee who had no access to any Government secrets or classified information and who occupied a position not involving the making of policy. Inasmuch as the criteria of Executive Order 10450 (Appendix "A", *infra*, pp. 31-33), cover virtually every aspect of "employee suitability", the decision below deprives millions of Government employees of the procedural safeguards of the Lloyd-LaFollette and Veterans Preference Acts whenever it is asserted in the name of "security" that they are "unsuitable" for Federal employment.[3]

In petitioner's case, the ruling of the court below deprived him, among other things, of the right to appeal to the Civil Service Commission.[4]

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[3] There are now approximately 2,300,000 federal employees covered by the security program. From May 28, 1953, through September 30, 1954, 3,002 federal employees were terminated under Executive Order 10450. Of those terminated, 1,645 occupied "nonsensitive" positions. (*Hearings, Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong. 1st Sess., March 16, 1955, pp. 515, 533, 569-570).

[4] Petitioner was covered by Section 14 of the Veterans Preference Act, which provides for written notice of an employee's removal, together with any and all the reasons therefor, at least 30 days in advance of the proposed action, and a written statement of the decision of the Agency Head, as a condition precedent to a valid discharge. In addition, the statute grants petitioner the right to an appeal hearing before the Civil Service Commission on *all procedural and substantive grounds*. The Commission's decision on appeal is binding on the removing officer. Petitioner was also covered by Section 6(a) of the Lloyd-LaFollette Act. Both statutes, in relevant parts, are set out in Appendix "A", *infra*, pp. 26-28.

The issues, which this Court is asked to decide for the first time, arise from the Federal Employees' security program, based upon the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1 to 22-3). As stated by Judge Edgerton in his dissent below:

> "In the Lloyd-LaFollette Act and the Veterans Preference Act, Congress limited the President's control over removals (from the classified civil service). No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations 64 Stat. 476, 5 U. S. C. 22-1, 22-3. The question is whether this case is within the exceptions." (Appendix "C", *infra*, p. 45.)

On all the questions raised by petitioner below, the Court of Appeals was divided. Petitioner contends, with Judge Edgerton, that the majority erred. His challenge is not premised upon any "right" to federal employment, but upon procedural rights enacted by Congress for the benefit of civil servants in the Veterans Preference and Lloyd-LaFollette Acts and in the Act of August 26, 1950, itself. He contends that these rights were violated and that his dismissal was without legal justification.

I.

The court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

(a) The Act of August 26, 1950 (64 Stat. 476, 5 U. S. C., Secs. 22-1, 22-3), as extended by Executive Order 10450, authorizes the dismissal of any government officer or employee "in the interests of national security". The District Court held that there was justification for dismissing petitioner "in the interests of national security", stating

that "conceivably it is within the realm of possible contemplation" that a Food and Drug Inspector might impair the public health (125 F. Supp. 284, 288). The only way petitioner could impair the public health was if he intentionally contaminated food he was required to inspect or if he intentionally failed to report evidence of contamination. In other words, if petitioner were disloyal, there was an exceedingly remote possibility that he might sabotage the food supply during time of national emergency. But respondents conceded in the court below that petitioner was not charged with disloyalty. Nevertheless, the majority opinion of Judge Prettyman held that the plain meaning of the statute authorized petitioner's dismissal.

We believe, on the conceded facts, that it was *not* "within the realm of possible contemplation" that petitioner's discharge could be justified "in the interests of the national security of the United States" and that the action of the Agency Head in dismissing petitioner under the statute on these facts is an apparent conflict with the principles enunciated by this Court in *Ex Parte Mitsuye Endo*, 323 U. S. 283, 300-301. Cf. *Weiman* v. *Updegraff*, 344 U. S. 182.

Whether a loyal employee, employed in an Agency which is not primarily concerned with vital matters affecting the national defense or security and who has no access to any government secrets or classified information and who occupies a position where he cannot influence policy against the interests of the United States, can be dismissed under a statute which authorizes dismissal "in the interest of national security" is an important question of Federal law which has not been, but should be, settled by this Court.

(b) Section 1 of the Act of August 26, 1950 provides that an Agency Head:

> "... may ... when deemed necessary in the interest of national security ... suspend ... *any civilian*

officer or employee" and "may . . . terminate the employment of such suspended civilian officer or employee whenever he shall deem such termination necessary or advisable in the interest of the national security of the United States." (emphasis supplied).

The court below held that the "any civilian officer or employee" provision was unlimited in application. Judge Edgerton dissented sharply with the majority on this issue. We think the statute limits the "any civilian officer or employee" provision to those situations where termination is "necessary or advisable in the interest of the national security of the United States". Whatever these words mean, and we think them not free from vagueness or difficulty, we believe that the Act's legislative history clearly demonstrates that Congress never intended it to apply to petitioner, a concededly loyal employee, holding a non-sensitive, non-policymaking position in an agency not primarily concerned with vital matters affecting the nation's military, foreign affairs or related programs. (See, e.g., *H. Rep. No. 2330*, 81st Cong., 2nd Sess., pp. 3-5; *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 2; *S. Rep. No. 1158*, 80th Cong., 2nd Sess., pp. 3-4; *H. Rep. No. 2264*, 80th Cong., 2nd Sess., p. 2; *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 23, 30, 1950, pp. 10, 18, 21, 25, 41, 43, 60, 67; *Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, pp. 7, 8, 17; *Hearings, Senate Committee on Armed Services on S. 1561*, 80th Cong., 2nd Sess., February 27, 1948, pp. 14-16.

In enacting the Lloyd-LaFollette and Veterans Preference Acts, Congress limited the President's control over removals. In enacting the Act of August 26, 1950, Congress created certain exceptions to the limitations created by the Lloyd-LaFollette and Veterans Preference Acts. We think the Act of August 26, 1950, limited the applicability

of the Lloyd-LaFollette and Veterans Preference Acts to cases other than those where removal was necessary or advisable in "the interest of the national security". The same limitation applied to extensions of the Act to other agencies and branches under Section 3 thereof. The intent of Congress as manifest in the history of the law; the common understanding of the Act as evidenced by considered administrative interpretations and by the obvious connotation of the words "interest of the national security"; and relevant judicial authority—all urge the same conclusion: the statute cannot be applied where there is no nexus between the employment and the nation's defense, preparedness, and similarly related programs. (See "*A Report by the Inter-Departmental Committee on Internal Security on the Government Employee Security Program*", April 29, 1952 [Whitehouse Mimeograph Release No. 3326; August 8, 1952, pp. 13-16, 27], relevant portions of which are set forth in Appendix "B", *infra*, pp. 34-38).

Petitioner contends that on the conceded facts, the extraordinary authority granted Agency Heads by the Act of August 26, 1950 could not be used to discharge him summarily on the grounds of security. If his discharge on some other ground or under some other authority was desired, he was entitled to all of the procedural rights provided him by the Veterans Preference and Lloyd-LaFollette Acts. In creating an exception to those rights, Congress had the power to limit the exception as it previously had the power to create the rights thus excepted to. Yet in firing respondent pursuant to the mandate of Executive Order 10450, respondent Hobby ignored the plain limitations of her statutory authority. If she was free to do so, then the Executive is at liberty to ignore any Congressional limitation on the manner in which it may fire employees, and civil service laws can be repealed by Presidential fiat. The court below intimated that this

was so. But such a fundamental issue is surely for this Court to decide.

The exient to which the Act of August 26, 1950, supersedes the Veterans Preference and Lloyd-LaFollette Acts is an important question of Federal law which has not been, but should be, settled by this Court. Inasmuch as the decision below affects the entire Federal Civil Service, it is of such vital public importance as to require this Court to grant certiorari.

(c) The Act of August 26, 1950, in providing that a stated group of department and agency heads "may, in [their] absolute discretion and, when deemed necessary in the interest of the national security, suspend, without pay any civilian officer or employee . . .", is permissive in application. The use of the words "absolute discretion" leaves little doubt that Congress intended the Agency Head to make the sole determination as to the extent of the Act's application within his own agency whenever it was necessary or advisable in the interest of the national security.

The Act of August 26, 1950, mentions the President only twice; Section 3 (5 U. S. C., Section 22-3), provides that the Act shall apply to agencies and departments other than those referred to in Section 1, "as the President may, from time to time deem necessary in the best interests of national security", and that the President shall report to Congress on any such extensions to other agencies and departments. For the rest, the statute is a direct grant by Congress to the agency and department heads covered under it and is permissive in application. The President is given no authority to limit, vary or enlarge this grant, nor is he authorized to divest an agency head of his absolute discretion to determine, under the standard—when "necessary or advisable in the interest of the national

security", the extent of the Act's coverage within the confines of his own department.[5]

A comparison of this limited grant of power with the mandatory provisions of the Executive Order (see Executive Order 10450, Sections 4, 5, 6 and 7) discloses that the discretionary application of the statute has been transformed into the mandatory requirements of Executive Order 10450. We think these changes clearly deprive an agency head of his "absolute discretion" to determine the

[5] We think this was made clear by Assistant Attorney General Tompkins during the recent hearings before the senate sub-committee to establish a Commission on Government Security:

"Senator Cotton: Mr. Tompkins, I asked you about the matter of coordinating, and making uniform the procedure in the various departments, and what, if anything, could be done to bring that about.

"Am I correct in my understanding that the Congress in its infinite wisdom has written into the law that each department head has complete authority in determining procedures in his department in connection with security?

"Mr. Tompkins: You are referring to Public Law 733, 81st Congress, I think, Senator, in which the final responsibility is vested in the head of the department or agency. That is correct.

"Senator Cotton: So that under the present law, neither the Civil Service Commission nor the Department of Justice, nor anyone else, can say to a department head, 'You shall inaugurate changes of practices or systems in your clearance of your employees.'

"Mr. Tompkins: That is correct.

"Senator Cotton: And even the President of the United States could not say to a department head, 'You shall incorporate certain new systems in your department'; though he might say to the Secretary, 'If you do not do it, I shall find a new secretary.'

"Mr. Tompkins: That would be correct, Senator."

(Hearings, *Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong., 1st Sess., March 8, 1955, at pp. 59-60.)

extent of the statute's application within his own agency whenever necessary or advisable in the interests of national security. Cf. *Miller* v. *United States*, 294 U. S. 435, 440.

The court below split sharply on this question. The majority believed that petitioner's argument was that, since the statute places discretion in the "Agency Head", the President had no power to issue an order on the subject; but that, since Congress was presumed to have known that subordinate officers of the Executive Branch acted under direction of the President, it had this fact in mind when it conferred discretion on the Agency Heads in the statute. Judge Edgerton, dissenting, believed that the statute applied only to agencies which were "sensitive" or become so in the future.

We believe the majority's conclusion is at odds with any proper construction of the law. Assuming, *arguendo*, that the President had the power to extend the Act of August 26, 1950, to each and every Agency of the Government, we believe he had no power whatever to extend the statute to *each and every employee* in each and every Agency, under a rigid single standard which precluded the exercise of any discretion on the party of the Agency Head, irrespective of the degree to which the employee's position affected the national security.[6]

We think the division in the court below on this issue is the result of a misunderstanding of the legislative scheme embodied in the Act of August 26, 1950. We believe that the legislative scheme requires flexible standards for

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[6] Cf. Statement of former Senator Harry P. Cain, member of the Subversive Activities Control Board, *"Washington Post"*, January 16, 1955: "This criterion that an accused applicant or employee must meet the test that his employment is 'clearly consistent' with the interest of the [national security]; constitutes a burden which can hardly be borne by anyone. . . . Any system through which men and women are judged must provide the judges with room for judgment and discretion."

Federal employees, depending upon the extent to which the national security interest permeates the agencies in which they are employed, and the particular positions held by them within those agencies. While we agree with Judge Prettyman that the President clearly had the right to direct his subordinates to exercise their "absolute discretion" in a manner consistent with the statute, we do not agree that he had the right to deprive them of that discretion by requiring the dismissal of each and every employee who did not meet the mandatory Presidential standard—a standard more onerous than that provided by the Congress. (See *United States, ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260.) This issue does not involve the naked exercise of the Executive power. (*Kendall* v. *United States, ex rel. Stokes*, 12 Pet. 524, 37 U. S. 524.) Rather, it involves that aspect of the Executive power which Congress has the right to reasonably restrict, regulate and direct. (See *United States* v. *Perkins*, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52.)

In this connection, we think the President's order was not an exercise of the Executive power, but an unauthorized amendment of the Veterans Preference and Lloyd-La-Follette Acts and that his action violated the principles enunciated by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

Whether Executive Order 10450 invalidly deprived various Agency Heads of a discretion vested directly in them by a Congressional exception to the President's removal power under the Constitution is an important question of Federal Law which has not been, but which should be, settled by this Court.

II.

The court below has decided Federal questions in a way in conflict with applicable decisions of this Court.

(a) Section 1 of the Act of August 26, 1950, establishes the standard to be followed by an agency head in determining whether a particular employee should be retained or terminated. The standard is set forth in the statute as follows:

> "The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine *such termination necessary or advisable in the interest of the national security of the United States* . . ." (emphasis supplied).

The Executive Order, on the other hand, establishes a different standard for retention or termination, namely, that unless retention is established affirmatively to be "clearly consistant with the interests of the national security", the employee *must* be terminated. (See Executive Order 10450, Sections 2, 4, 5, 6 and 7.)

As has already been stated, the power granted to the President by the Act of August 26, 1950, Section 3, was limited to an extension of Section 1 to departments and agencies not initially made subject to the Act. We think the President had no authority to revise the statutory standard to be used by agency heads in arriving at a particular determination, for, even if it be conceded that the President could extend the provisions of the Act of August 26, 1950 to every department and agency head of the Federal Government, it is obvious that he could not prescribe

standards thereunder more onerous than those established by Congress. (See *Morrill* v. *Jones*, 106 U. S. 466; *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 616, 618.)

Thus, when respondent Hobby applied Executive Order 10450 to petitioner, which the Executive Order required her to do, and found that it required his dismissal, a more onerous standard of judgment ("clearly consistent with the interests of the national security") was used than that provided by the Act of August 26, 1950 ("necessary or advisable in the interest of the national security"). Indeed, the Agency Head never made a determination that petitioner's dismissal was "necessary or advisable in the interest of the national security of the United States", the standard established by Congress. Elsewhere, the court below has noted that such a change of standard can be decisive of an employee's loyalty or security status. (See *Jason* v. *Summerfield* [C. A. D. C.] 214 F. 2d 273, 276, cert. den. 348 U. S. 840).

Judge Edgerton's dissent points out that the standard of Executive Order 10450 "differs vitally from the 'necessary or advisable' test that Congress prescribed".

> "The difference is closely paralled to that between the test, 'reasonable grounds exist for belief that the person involved is disloyal', used in Executive Order 9835; and the test, 'There is a reasonable doubt as to the loyalty of the person involved', used in the later Executive Order 10241. As this court has held, that 'amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal', does cause a reasonable doubt as to whether he is in fact loyal * * * Just so here, the amended standard applied a more rigid test of suitability for government employ-

ment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is 'necessary or advisable in the interests of national security', does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be, he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-LaFollette Act and the Veteran's Preference Act." (Appendix "C", *infra*, pp. 47-48.)

We believe that the action of the Agency Head in dismissing petitioner under this more onerous standard was in direct conflict with the principles enunciated by this Court in such cases as *Miller* v. *United States*, 294 U. S. 435; *Waite* v. *Macy*, 246 U. S. 606, 609 and *Jones* v. *Securities Exchange Commission*, 298 U. S. 1, 21-22.

By reason of its effect on the entire Federal Civil Service, the question whether the standard established by Executive Order 10450 is consistent with the Act of August 26, 1950, is of paramount significance. The court below has decided this question in a way in conflict with applicable decisions of this Court.

(b) This Court will note that the notice of dismissal terminating petitioner's employment failed to set forth any of the reasons for the Agency Head's determination. We believe, as did Judge Edgerton, that this notice of dismissal was not "a written statement of the decision of the Agency Head" which is required by the Act of August 26, 1950. Judge Edgerton's dissent points out that:

> "* * * The letter telling appellant he was dismissed, but not telling him why, was evidently not a 'written statement of the decision' as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given, no safeguard is provided." (Appendix "C", *infra*, p. 49.)

We think the action of the Agency Head in not furnishing petitioner with the reasons for his removal is in direct conflict with the principles enunciated by this Court on various occasions. (See *e.g.*, *Securities Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 94-95; *Securities Exchange Comm.* v. *Chenery Corp.*, 322 U. S. 194, 196-197; *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 498, 511; *Florida* v. *United States*, 282 U. S. 194.)[7]

Because of its effect on millions of government employees, the meaning of the Act of August 26, 1950's requirement that an employee have a "written statement of the decision of the Agency Head" should be resolved by this Court, not only because it is a vital issue of Federal law, but because the decision below represents a basic departure from the applicable decisions of this Court which enunciate the principle that reasons for an executive agency's action, taken pursuant to conditions laid down by Congress, must be set forth in its decision.

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[7] The majority holding below conflicts with its own holding in *Lambros* v. *Young* (C. A. D. C.), 145 F. 2d 341, 343, ftn. 2, where the Court quoted with approval, "The decision . . . is the basis upon which the judgment of the court rests."

Conclusion

Twice before this Court has granted certiorari on the constitutional issue of the right of confrontation and cross-examination under the "Loyalty Program" established by Executive Order 9835 (*Bailey* v. *Richardson*, 339 U. S. 977; *Peters* v. *Hobby*, 348 U. S. 882).

This case does not involve that question, but raises companion issues of equal, if not greater, significance.

These questions affect all of some 2,300,000 Federal employees, but they are of particular, frequently decisive, importance to the hundreds of thousands of loyal public servants whose employment has no conceivable nexus to our national security. Already there have been hundreds of such persons who like petitioner have been discharged or who are presently awaiting decision on their security status.[8] A large percentage of all Federal employees are now directly governed by the decision below.[9]

In the light of the grounds for removal set forth in Section 8(a) of Executive Order No. 10450, as amended, the pragmatic effect of the decision below will permit the virtual cashiering of any civil servant for unstated reasons which may have no possible justification in considerations of the national security. Moreover, since such a discharge is dishonorable, its stigma may permanently cripple the victim's reputation and earning capacity. Executive authority to work such consequences, in derogation of previously established statutory guarantees to civil serv-

[8] See Note 3, *supra*, at p. 9.

[9] Since actions against Agency heads to contest discharges must generally be brought in the District of Columbia for reasons of jurisdiction and venue, the division in the court below has added significance.

ants, should not be lightly implied. Petitioner asserts, as did Judge Edgerton, that it does not exist. The questions which he raises are ones which this Court should decide.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Act of August 26, 1950, c. 803, 64 Stat. 476, 5 U. S. C. Sections 22-1, *et seq.*, Public Law 733, 81st Cong. 2nd Sess.

5 U. S. C. SECTION 22-1: (PUBLIC LAW 733, SECTION 1)

Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency

head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22-1 to 22-3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further*, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further*, That the head of any department or agency considering the appointment of any

person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

* * *

5 U. S. C. Section 22-3: (Public Law 733, Section 3)

The provisions of sections 22-1 to 22-3 of this title shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

* * *

Act of June 27, 1944, c. 287, Section 14, 58 Stat. Section 14 of the Veterans Preference Act, 5 U. S. C., Section 863.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons,

specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .

* * * * * * *

Act of August 24, 1912, c. 389, Section 6, 37 Stat. 555, as amended June 10, 1948, c. 447, 62 Stat. 354, Section 6(a) of the Lloyd-LaFollette Act, 5 U. S. C., Section 652(a).

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on

such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reason for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission . . .

* * *

EXECUTIVE ORDER No. 10450

Apr. 27, 1953, 18 F. R. 2489, as amended by Executive Order No. 10491, Oct. 15, 1953, 18 F. R. 6583; Executive Order No. 10531, May 27, 1954, 19 F. R. 3069; Executive Order No. 10548, Aug. 3, 1954, 19 F. R. 4871; Executive Order No. 10550, Aug. 6, 1954, 19 F. R. 4981.

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYEES

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privilege to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * *

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the reten-

tion in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security which finding shall be

made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another

government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

* * * * * * *

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

* * * * * * *

APPENDIX "B"

A REPORT

BY THE

INTERDEPARTMENTAL COMMITTEE ON INTERNAL SECURITY

ON

THE GOVERNMENT EMPLOYEE SECURITY PROGRAM

AS SUBMITTED TO

THE PRESIDENT

BY THE

NATIONAL SECURITY COUNCIL

(April 29, 1952, White House Mimeograph Release No. 3326, August 8, 1952)

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* * *

IV. CONCLUSIONS

1. *An employee security program must be limited to the legitimate interest of national security.* Section 6 of the Act of August 24, 1912 (Lloyd-LaFollette Act) provides for the suspension and removal of employees from the classified service "for such cause as will promote the efficiency of such service." Historically, the rules and regulations of the Civil Service Commission have provided that appointment in the competitive service may be denied to applicants for a number of reasons. These reasons, which are generally referred to as relating to "suitability," are listed in section 2.104 of the Commission's regulations. They include the standard which is prescribed in Executive Order 9835 to govern denial of or removal from employment on the grounds of loyalty. The same grounds which justify denial of appointment in the competitive civil service will also justify removal of an employee from that service.

It may be seen, therefore, that even in the absence of an employee security program or security legislation, a person may be denied employment, or removed from employment, in the Federal civil service for a number of reasons. This has led many persons to question the need for a formal "security" program, superimposed on the existing programs relating to loyalty and suitability. It is the opinion of the Committee that an employee security program is justified, *within limits*, in order to afford the fullest possible protection to the national security. A program such as may be established under Public Law 733, affords the necessary authority to agency heads for getting questionable employees quickly out of sensitive positions when other remedies are not available. It also permits appropriate action to be taken to protect the Government against persons who may knowingly or unknowingly endanger the national security even though there may not be "reasonable doubt" as to their loyalty.

An employee security program, as in the case of the Employee Loyalty Program, is a special program which can be justified in these times. As such, it must be applied only to the extent required "in the interest of national security." Further, it is not required as, nor should it become, a substitute for the programs which have been established to handle cases of applicants or employees of doubtful loyalty or doubtful suitability.

Not all departments and agencies of the Government will have need of an employee security program since the national security, in the sense contemplated, will not be involved in their operations. Public Law 733 provides authority to suspend and remove employees "in the interest of the national security." This authority is limited to those departments and agencies named therein and to such other departments and agencies as may be designated by the President "in the best interests of national security." Obviously, it was the intention of the Congress to limit the

application of that authority to those departments and agencies whose employees, in the performance of their duties, might be in position to endanger or compromise the national security. The term "national security" is not defined in the law. It is clear, however, that the term does not relate to *all* functions and activities of the Federal Government; if so, the law would have been applicable to all departments and agencies. In a general sense, it appears that "national security" as used in Public Law 733 relates to the ability of the country to protect and defend itself against hostile or destructive action, overt or covert, including enemy military action. . . . Any act, or failure to act, which would have the effect of weakening or compromising this ability can be said to endanger the national security. Any department or agency whose functions are such that acts, or failures to act, on the part of employees would have this effect will have need of an employee security program.

On the other hand, acts or failures to act which would have no direct bearing upon the ability of the country to protect and defend itself against hostile or destructive action, cannot be said to endanger the national security. This is true even though such act, or failure to act, may be a breach of confidence or trust; may cause embarrassment to a department or agency of the Government, or to a Government official or officials, or to private citizens; may cause financial loss to the Government or unjust enrichment of a person or persons; or may endanger a non-security program of the Government. Thus, many departments and agencies are responsible for functions which, while they are intimately connected with the welfare and happiness of the people of this country, are not directly related to the national security as that term is used in connection with an employee security program.

Furthermore, even in those departments and agencies which have need of an employee security program, not *all* positions in the department or agency will necessarily be

concerned with the "national security," and therefore not all employees will be in a position to compromise or endanger the national security. The program must be applicable only with respect to those positions, which may be designated as "sensitive positions," whose incumbents might be in position to endanger the national security.

These facts will serve to limit an employee security program to: (1) Those departments or agencies, or parts thereof, whose functions are concerned with the "national security"; (2) Those positions which may be designated as "sensitive"; and (3) Those adverse actions against employees in or applicants for sensitive positions which cannot appropriately be taken either under the loyalty program or for reasons of general suitability under civil service rules and regulations (pp. 13-16).

* * *

V. Recommendations

1. In the interest of promoting uniformity in determining the need for and the extent of employee security programs in the various departments and agencies there should be definitions of the key terms "national security" and "sensitive position." For this purpose the following definitions are recommended:

> The term *national security* as used herein relates to the safeguarding of the United States against any attempt to destroy or weaken it by force or violence, subversion, or any other means. Within the area required to be safeguarded are military, foreign relations, and related matters of the Government, the disclosure or compromise of which would aid our enemies or would endanger our defense. As used herein the term national security does not include questions of policy or judgment with respect to other Government matters relating to the general welfare, health and happiness of our people in their economic

and political life, not requiring security classification. *Sensitive position* means (1) Any position the duties or responsibilities of which require that the incumbent have access to security information or material, classified "Confidential", "Secret" or "Top Secret"; and (2) Any position which exists in an organizational entity where, because of the nature of the work being done, the very presence of the incumbent would make it possible for him to obtain possession of security information or material, classified "Confidential", "Secret" or "Top Secret", or to commit acts which would directly endanger the national security.

2. The head of each department and agency of the Federal Government should be responsible for identifying the sensitive positions, if any, in his department or agency, using the uniform definition of "sensitive position."

3. Based upon his review and identification of sensitive positions, the head of each department and agency to which Public Law 733, 81st Congress, is not already applicable should decide whether, in his opinion, there is need for an employee security program in his department or agency. If he decides after consultation with ICIS that such program is necessary, he should request issuance of Executive Order authority through normal channels for extension of the provisions of Public Law 733 to his department or agency.

4. Employee security programs should not be construed to replace, change or otherwise modify the Federal Employee Loyalty Program or the laws, and the rules and regulations of the Civil Service Commission, relating to suitability for employment in the competitive civil service. In any individual case the program most properly applicable should be utilized for its disposition (pp. 27-28).

APPENDIX "C"

Opinion of the Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12526

KENDRICK M. COLE,

Appellant,

v.

PHILIP YOUNG, Chairman, United States Civil Service Commission, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided July 28, 1955

Before EDGERTON, PRETTYMAN and BASTIAN, Circuit *Judges.*

PRETTYMAN, *Circuit Judge.* Appellant Cole was a five-point veterans' preference eligible employed in the classified Civil Service as a food and drug inspector in the Department of Health, Education and Welfare. After an investigation pursuant to Executive Order 10450 [1] he received a written statement of charges, which were, generally speaking, that he had continued in close association with individuals reliably reported to be Communists and

[1] 3 C. F. R. 72 (Supp. 1953).

had donated to and attended meetings of an organization designated by the Attorney General under Section 12 of the Executive Order. He replied to this letter, declining to make any explanation of the charges, saying that the request of the Government was an invasion of his private rights and of his right of freedom of association. His letter was forwarded to the Secretary, who ordered that his employment be terminated. Some two weeks later Cole, by his counsel, wrote the Secretary, asking a reopening of the case and stating that if it were reopened he would prove that he had not knowingly had the associations or relations which were alleged. The Secretary denied the reopening and later denied a second request for a reopening. Cole appealed to the Civil Service Commission under Section 14 of the Veterans' Preference Act,[2] but the Director would not accept the appeal. The Commission approved the Director's decision, holding that Act not applicable to dismissals under Public Law 733.[3] Thereupon Cole filed a civil action in the District Court, praying for a declaratory judgment and for an order restoring him to his position. The District Court, with an exhaustive opinion,[4] granted the defendants' motion for judgment on the pleadings, dismissing the complaint for failure to state a claim upon which relief could be granted.

Upon his appeal to this court Cole makes three principal points, and the Government makes one additional point, which it raised in its motion for judgment on the pleadings. It says Cole failed to exhaust his administrative remedy and so his action in court must fail. While Cole failed to pursue the administrative remedy

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[2] 58 Stat. 390 (1944), as amended, 5 U. S. C. A. § 863.

[3] 64 Stat. 476 (1950), 5 U. S. C. A. § 22-1 *et seq.*

[4] Cole v. Young, 125 F. Supp. 284 (1954).

offered him—he affirmatively rejected it—nevertheless the administrative process was exhausted and a final administrative decision was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken.

Cole's first point is that the President could not extend the summary dismissal provisions of Public Law 733 to employees holding non-sensitive, non-policy-making positions in a Department such as Health, Education and Welfare. He makes an extensive argument based upon the congressional debates and several writings in the field, plus a rationalization of the purposes of such a statute. The trouble with the argument is that the statute itself is explicit on the point. It provides:

> "SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." [5]

The statute puts the selection of the agencies to be affected in the hands of the President. It says nothing about sensitiveness or policy-making. The basic provision of the statute (Section 1) applies in terms to "any civilian officer or employee" in the named departments and agencies. When the President, under Section 3, *supra*, makes the statute applicable to other departments, he makes the "any civilian" provision applicable.

The foregoing is entirely constitutional. The Constitution vests all executive power in one person, the President. It provides: [6] "The executive Power shall be vested in a President of the United States." His is a lone, personal responsibility in so far as carrying out

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[5] 64 Stat. 477 (1950), 5 U. S. C. A. § 22—3.

the laws which Congress has enacted is concerned. The business of the Congress is to make laws. The business of the President is to carry them out. Authority is ordinarily a concomitant of responsibility. But we need not here venture into the intricacies of executive-legislative relationship in respect to executive employees. It is enough to say that, when the Congress recites that the President may dismiss summarily executive employees whenever he deems dismissal necessary or advisable in the interest of the national security, the enactment is valid. The policies to be pursued in the matter by the Congress and by the President are for them to determine, not for us.

Cole's second point is that Public Law 733 at most authorizes summary dismissal when such termination of employment is "necessary or advisable in the interest of the national security", while Executive Order 10450 requires agency heads to insure that the retention of any employee "is clearly consistent with the interests of the national security." He says the latter quoted clause is not within the former and, therefore, the Order is not within the statute. But we think the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute; and this is quite apart from the consideration that the President may have such power (to dismiss executive employees whose retention he deems not clearly consistent with the national security) as a part of the direct constitutional grant of "executive power". There

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Art. II, § 1, cl. 1.

is a line somewhere beyond which Congress cannot go in enacting prescriptions in respect to executive power over executive employees. It might be, for example, that, if Congress required the hiring of executive personnel whose employment the President deemed not consistent with the national security, the enactment would be void. Congress has the power to make the laws and so can make laws concerning Government employ; but the President has the power, and so the responsibility, of carrying out all the laws, and Congress cannot impinge upon that power. There is a boundary between the two powers. We do not have that problem in our view of the case. We advert to it because of the view expressed by our dissenting judge. If we were of his view and thought the President's Order inconsistent with the act of the Congress, we would have to decide the constitutional question thus presented.

Cole seems to argue that, since the statute places the discretion in the "agency head", the President had no power to issue an Order upon the subject. In the first place, this is an executive matter and, if Congress had means to prohibit the President from acting in respect to it, a serious question as to the validity of its act would arise. As we have already said, the Constitution vests the executive power in the President. In the second place, Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the enactment. In the third place, Cole's argument in its ultimate essence is that the action of the agency head in the case at bar was void; thus the argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a

superior. That position is untenable on its face. The President surely has the right to lay down the lines within which his subordinates shall exercise discretions confided in them, and their operation within such lines is valid, not void. Perhaps, if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here.

Cole's third point is that his notice of dismissal was not the required "written statement of the decision of the agency head". Public Law 733 provides that an employee proposed for suspension "shall be notified of the reasons for his suspension". Cole does not, and could not, complain about the sufficiency of the statement given him at this point. Then the statute provides that an employee proposed for dismissal shall receive five things, the first of which is a statement of the charges against him and the last a written statement of the decision of the agency head. Cole does not claim he did not get a written statement of the charges against him or that the statement given him was inadequate. His claim is that the letter of the Secretary which advised him his employment had been ordered terminated, "based on the study of all the documents in your case, including your reply to reference letter," was not a compliance with the statute as above quoted.

We are all familiar with the difference between "opinions" and "decisions" in judicial matters. "Opinions" state the reasons, and "decisions" merely state the actions taken. The statute here used a well-known word, and we give it its well-known meaning.

Cole claims the applicability of *Mulligan* v. *Andrews*,[7] but the statute there involved required a statement of the

[7] 93 U. S. App. D. C. 375, 211 F. 2d 28 (D. C. Cir. 1954).

"reasons" for removal. The statute now before us does not so provide in respect to the final step in a termination of employment.

The judgment of the District Court dismissing the complaint is

Affirmed.

EDGERTON, *Circuit Judge, dissenting:* As we held a year ago, enforcing the Lloyd-LaFollette Act's requirement that "No person in the classified civil service of the United States shall be removed" without notice and reasons in writing: "The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear." *Roth* v. *Brownell*, U.S. App.D.C. , , 215 F. 2d 500, 502. It does not follow, of course, that Congress could impose absurd and crippling limits. But this is irrelevant here.

In the Lloyd-LaFollette Act and the Veterans' Preference Act, Congress limited the President's control over removals. No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations. 64 Stat. 476, 5 U.S.C. §§ 22-1, 22-3. The question is whether this case is within the exceptions. I think it is not, for three reasons.

1. The exceptions do not cover the Food and Drug Administration, in which the appellant was employed.

The Act of 1950 provides in § 1: "Notwithstanding the provisions of section 652 of this title [Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board;

or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee . . . ." Section 1 also provides that a suspended employee may be dismissed if the agency head thinks it "necessary or advisable in the interest of the national security". Section 3 provides that the Act "shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."

In Executive Order No. 10450 the President, ostensibly "deeming such action necessary in the best interests of the national security", undertook to extend the Act to "all other departments and agencies of the Government". I think this blanket extension unauthorized and invalid. Congress had specified some agencies that have something to do with national security. Committee reports describe them as "sensitive" or "concerned with vital matters" affecting national security. H.R.Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950); S.Rep. No. 2158, 81st Cong., 2d Sess. 2 (1950); S.Rep. No. 2264, 80th Cong., 2d Sess. 2 (1948). Evidently Congress thought some other agencies might likewise be concerned with national security. Accordingly Congress authorized the President to extend the Act. There is, I think, not the slightest reason for supposing that Congress intended to authorize the blanketing in of all agencies. A committee report said: "the bill makes ample provision for the employment in nonsensitive agencies of certain of those employees who may be classified in sensitive departments and agencies as security risks." H.R.Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950). Accordingly Section 1 of the Act provides "That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment

in any other department or agency of the Government . . . ." Since many agencies, including the Food and Drug Administration in the Department of Health, Education and Welfare, in which the appellant was employed, have nothing to do with national security, the Act of 1950 has nothing to do with them. The authorization to bring "other" departments and agencies within the Act should be recognized, in accordance with the purpose and intent of Congress, as limited to those that might reasonably be deemed "necessary in the best interests of national security." It could not reasonably be deemed necessary in the best interests of national security that employees in all agencies, including not only the Food and Drug Administration but the Fish and Wildlife Service, be subject to summary unappealable dismissal.

The Supreme Court has said regarding the "plain meaning" of an Act of Congress: "When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

2. The Act of 1950 authorizes the head of an agency covered by the Act to dismiss suspended employees "whenever he shall determine such termination necessary or advisable in the interests of the national security". Appellant's agency head did not make that determination concerning the appellant, but determined only that appellant's continued employment "is not clearly consistent with the interests of national security". In Executive Order 10450 the President purported to adopt the "clear-

ly consistent" test, but he had no authority to adopt it. It differs vitally from the "necessary or advisable" test that Congress prescribed.

The difference is closely parallel to that between the test, "reasonable grounds exist for belief that the person involved is disloyal", used in Executive Order 9835, and the test, "There is a reasonable doubt as to the loyalty of the person involved", used in the later Executive Order 10241. As this court has held, that "amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal,' does cause a reasonable doubt as to whether he is in fact loyal." *Jason v. Summerfield*, [illegible] U.S.App.D.C. [illegible], 214 F. 2d 273, 276, *cert. denied*, 348 U.S. 840.[1] Just so here, the amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is "necessary or advisable in the interests of national security", does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-LaFollette Act and the Veterans' Preference Act.

---

[1] The Court found the difference so essential that employees who had been cleared under the old standard might be reexamined and dismissed under the new one.

3. The procedure used in appellant's dismissal does not even comply with the Act of 1950. Even that Act requires "a written statement of the decision of the agency head". Frequently, in legal connections, "decision" means not only a result but the reasons for the result.[4] The Administrative Procedure Act follows this usage. It requires that "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Sec. 8(b); 60 STAT. 242, 5 U.S.C. § 1007(b). The letter telling appellant he was dismissed, but not telling him why, was evidently not "a written statement of the decision" as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given no safeguard is provided. *Cf. Mulligan v. Andrews*, 93 U.S.App.D.C. 375, 211 F. 2d 28.

---

[4] One of the definitions of "decision" in WEBSTER is "an account or report of a conclusion; especially of a legal adjudication or judicial determination of a question or cause; as, a *decision* of the Supreme Court.". One of the definitions in the CENTURY is "... final judgment or opinion in a case which has been under deliberation or discussion; as, the *decision* of the Supreme Court."

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Supreme Court of the United States

October Term, 1955

No. 442

KENDRICK M. COLE,

Petitioner,

against

PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the United States Civil Service Commission, and OVETA CULP HOBBY, Secretary, Department of Health, Education and Welfare,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Statement

Petitioner believes it necessary to reply to a number of Respondents' contentions set forth in their Brief in Opposition.

(1) It is pertinent to note that the major portion of Respondents' Brief deals with the well-settled rule that this Court will not intervene to review the basis of an Executive Officer's determination discharging an employee, and that judicial inquiry has generally been restricted to the question of compliance with statutory requirements. A different situation obtains here. Respondents have con-

ceded that petitioner is a loyal employee, holding a non-sensitive, non-policy-making position in an Agency which is not primarily concerned with national defense or related matters. Accordingly, the question presented is not whether the assigned reasons for petitioner's discharge should be reviewed by this Court, but whether petitioner, in view of the conceded facts, could be removed, in derogation of his rights under the Veterans Preference and Lloyd-La Follette Acts, under a statute which authorizes removal only where "necessary or advisable in the interests of the national security." That is a judicial question, and one which requires review. (*Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Stark* v. *Wickard*, 321 U. S. 288, 310.)

(2) Respondents' second contention, in essence, is an attempt to dilute petitioner's argument that, in view of the conceded facts, the Secretary could not conceivably have determined that petitioner's discharge was either "necessary or advisable in the interests of the national security" (Res. Br., pp. 12-14). Respondents' argument ignores the plain wording of the Regulations of the Department of Health, Education and Welfare, promulgated September 24, 1953.

Section 2 of those Regulations provides:

> "It shall be the policy of the Department, based on the said Act of August 26, 1950, and the said Executive Order No. 10450 as amended, to employ and to retain in employment only persons whose employment or retention in employment is found to be clearly consistent with the interests of the national security. It shall be the policy of this Department that action on cases involving personnel holding non-sensitive positions in which the relationship of the Government employment to the national security is remote shall normally be taken under routine personnel procedures *if no part of the derogatory infor-*

mation relates to subversion. (Section 3(b)(2) through (8) of these Regulations.)" (Emphasis supplied.)

The phrase "Section 3(b)(2) through (8) of these Regulations" refers to the criteria relating to "subversive" acts and associations contained in Sections 8(a)(2) through (8) of Executive Order 10450, 18 F. R. 2489, as amended, which is set forth in full in Petitioner's App. "A" at pages 32-33 of the Petition.

We think it clear that a concededly loyal employee who associates with Communists; a drunkard; or a person addicted to the use of narcotics, may present a risk to the national security interest where he holds a position in which he has access to classified or secret information, or where he can strongly or otherwise influence policy. But if the loyal employee occupies a non-sensitive, non-policy-making position in an Agency not primarily concerned with the national defense or related matters, is he any more of a risk if he associates with Communists than if he is addicted to the use of narcotics? We think the answer must be "No." However, the policy set forth in the above-quoted Regulation makes it clear that drug addicts and drunkards who occupy non-sensitive jobs are not to be considered "security risks", but that individuals who associate with Communists (although completely loyal themselves) are.

Accordingly there can be no question that in Mr. Cole's case the Secretary totally failed to consider the relationship between petitioner's job and the national security, for if she did consider this relationship, her determination, in the light of the conceded facts, was patently arbitrary. Indeed, a reading of the Secretary's Regulation compels the irrefutable conclusion that if Mr. Cole had been charged with being a habitual user of heroin, he would not have

been deprived of his rights under the Veterans Preference and Lloyd-La Follette Acts.

(3) Respondents' assertion that Executive Order 10450 does not ignore the relative sensitivity of various positions in the Executive Branch (Res. Br., p. 17) totally ignores the key section of that order—Section 7. Section 7 of Executive Order 10450 provides:

> "Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, *shall not be reinstated or restored to duty or reemployed in the same department or agency* and shall not be reemployed in any other department or agency, *unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security* which finding shall be made a part of the records of such department or agency;" (Emphasis supplied.)

Thus, the discretion directly vested by Congress in Agency Heads to suspend, terminate and reinstate suspended employees is conditioned by the Executive Order in the case of reinstatement, on an affirmative finding by the Agency Head that the employee's retention is "clearly consistent with the interests of the national security." In short, Section 7 of Executive Order 10450 imposes on the suspended employee the necessity of an affirmative finding of "clearly consistent with the interests of the national security" as a condition precedent to the exercise of the Agency Head's discretion to reinstate him to duty. It is this condition precedent, as well as the other provisions of

the Executive Order, which creates "a standard more onerous than that provided by the Congress". (See: Pet., pp. 17-20).

(4) Respondents' assertion in answer to petitioner's argument that the notice of dismissal was not "a written statement of the decision of the agency head" is bottomed on their contention that "petitioner does not complain of the insufficiency of the statement of charges . . ." (Res. Br., p. 19). We respectfully call the Court's attention to the letter of petitioner's counsel to the Secretary, dated February 10, 1954, in which counsel stated:

> "I respectfully submit for your consideration the following additional factors:
>
> "(1) the charges contained in the letter of November 25, 1953 were insufficient on their face and not in compliance with Section 14 of the Veterans Preference Act (5 U. S. C. Sec. 863) or the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, et seq.) . . ." (J. A. 30).[1]

(5) Respondents' attempt (Res. Br., pp. 20-21) to negate petitioner's argument that Congress never intended the Act of August 26, 1950 to apply to petitioner, alleging the non action of Congress for two and one-half years since the Executive Order was promulgated, cannot be seriously considered. In the first place, it is well-settled that events occurring or statements made after the enactment of a statute, or congressional inactivity on the subject can never supplant the contemporaneous intent of the Congress which adopted the statute as to the meaning of its terms. (See: *United States* v. *Minn. Harvester*, 330 U. S. 258, 282; *Fourcade* v. *United States*, 330 U. S. 8, 14; *Helgerson* v. *Hallock*, 309 U. S. 106, 119.) Secondly, representatives of the Executive

[1] The letters "J. A." refer to the Joint Appendix as printed for the use of the Court below.

Branch testifying on the operation of the statute as extended by Executive Order 10450, have repeatedly informed Congressional Committees that neither the statute nor the Executive Order is used to discharge as a "security risk", a concededly loyal employee holding a non-sensitive, non-policy-making position in a non-sensitive Agency. (See, e. g., the testimony of William F. Tompkins, Assistant Attorney General, and Philip Young, Chairman, United States Civil Service Commission, *Hearings, Senate Sub-Committee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong., 1st Sess., March 8 and 16, 1955, at pp. 92, 95, 96, 99-100, 125-126, 530).

CONCLUSION

For the foregoing reasons and the reasons heretofore set forth in the petition, a writ of certiorari should be granted.

Dated: November 3, 1955.

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BRIEF FOR PETITIONER

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IN THE

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (R. 45-53) is reported at 125 F. Supp. 284. The opinions of the Court of Appeals, *i.e.*, the majority opinion of Judge Prettyman and the dissenting opinion of Chief Judge Edgerton (R. 55-63) are reported at 226 F. 2d 337.

Jurisdiction

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 64). The petition for a writ of certiorari was filed on October 3, 1955, and was granted on November 21, 1955 (R. 65). On November 21, 1955, this Court granted petitioner's motion to substitute respondent Folsom in

place of respondent Hobby (R. 65). Respondent Folsom succeeded respondent Hobby as Secretary of the Department of Health, Education and Welfare upon the latter's resignation. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Statutory Provisions and Executive Orders Involved

The statutes involved are the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C., 22-1 to 22-3, hereafter generally referred to as the "Act of August 26, 1950"; Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C., 863, hereafter generally referred to as "The Veterans' Preference Act"; Section 6a of the Lloyd-LaFollette Act, 37 Stat. 555, 5 U. S. C. 652a, hereafter generally referred to as "The Lloyd-LaFollette Act." The Executive Order involved is No. 10450, April 27, 1953, 18 F. R. 2489, as amended by Executive Order No. 10491, October 16, 1953. 18 F. R. 6583, hereafter referred to as "Executive Order 10450." The statutes and the executive order, in relevant parts, are set forth in Appendix "A," *infra*, pp. 52-61.

Questions Presented

1. Could the Act of August 26, 1950, as purportedly extended by Executive Order 10450, validly deprive petitioner of his right to appeal his discharge from Federal employment as a "security risk" to the United States Civil Service Commission under Section 14 of the Veterans' Preference Act where it is conceded that he is a loyal employee holding a non-sensitive, non-policy-making position as a Food and Drug Inspector in the Department of Health, Education and Welfare?

2. Did Section 3 of the Act of August 26, 1950 (5 U. S. C. 22-3) authorize the President to require the dismissal of all

federal employees, irrespective of the sensitivity of their positions, whose employment is not found to be "clearly consistent with the interests of the national security," where Section 1 of the Act (5 U. S. C. 22-1) vests discretion in agency heads to suspend and remove federal employees only when necessary or advisable "in the interest of the national security"?

3. Is Executive Order 10450's standard of employee discharge (discharge mandatory unless retention is "clearly consistent with the interests of the national security") consistent with the standard of employee discharge established by the Act of August 26, 1950 (discharge discretionary whenever "necessary or advisable in the interest of the national security") so as to cut off petitioner's rights under the Veterans' Preference and Lloyd-LaFollette Acts?

4. Was the agency head's letter of January 15, 1954, terminating petitioner's employment as "not clearly consistent with the interests of national security," a "written statement of the decision of the agency head" as required by Section 1 of the Act of August 26, 1950?

Statement of the Case

A. Petitioner

Petitioner, an honorably discharged veteran, was classified as a five-point veteran's preference eligible pursuant to Section 14 of the Veterans' Preference Act of 1944 (R. 3, 37). Prior to his suspension on November 13, 1953, he held a position in the classified civil service as Food and Drug Inspector, Food and Drug Administration, New York District, Department of Health, Education and Welfare. It is conceded by respondents that in this position petitioner had no access to any secrets of the Government of the United States, or "classified" material, and was

not in a position to influence policy against the interests of the United States (R. 40).

On October 20, 1954, he was requested by the Chief of Personnel Security, Department of Health, Education and Welfare, to come to Washington, D. C., in connection with an investigation regarding his retention in employment, pursuant to the provisions of Executive Order 10450 which established the government employee security program. During this investigation, he was asked numerous questions about his attitudes, associations and friends (R. 3, 37).

Following this investigation, on November 13, 1953, petitioner received a notice of suspension "pending investigation under Executive Order 10450" (R. 3, 38). The Undersecretary of the Department of Health, Education and Welfare, by letter dated November 25, 1953, informed petitioner of the alleged reasons for his suspension and furnished him with a written statement of charges (R. 4, 38). The charges were:

> "1. That you established and have continued a close association with individuals reliably reported to be Communists.
>
> "2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.
>
> "3. That you have, by your own admission, donated funds to the Nature Friends of America.
>
> "4. That you have contributed your services in the form of work to the Nature Friends of America.
>
> "5. That you have attended social gatherings of the Nature Friends of America." (Pet.'s Ex. 3, R: 16-18.)

It was conceded by respondents in the court below that petitioner was not charged with being disloyal and that none of the charges implied any disloyalty on his part.[1]

Petitioner replied to this letter of November 25, 1953, on December 23, 1953, refusing to make any explanation of the charges since they concerned "associations which I carry on as part of my private informal social life. I consider any request by the U. S. Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of 'freedom of association' " (Pet.'s Ex. 4, R. 19).

On January 15, 1954, the Secretary informed him that his termination had been ordered effective at the close of business, January 20, 1954, since "based on the study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education and Welfare is not clearly consistent with the interests of national security" (Pet.'s Ex. 6, R. 21).

On January 27, 1954, petitioner, by his counsel, wrote the Secretary requesting a reopening of petitioner's case and a hearing. The request was based on the ground that petitioner wrote his letter of December 23, 1953, declining to answer the charges, while recovering from an operation for an esophageal diverticulum which caused petitioner to suffer an emotional and physical unbalance (Pet.'s Exs. 7-9, R. 22-26).

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[1] "The charges against [petitioner] do not imply any knowing acts of disloyalty on his part * * * *" "* * * As [petitioner] correctly said, 'In the charges made against me I am not accused of * * * doing or saying anything which would indicate that I am disloyal to the Government of this country.' Accordingly, there is no basis for treating [petitioner] as a loyalty case rather than as a security case." (*Appellees' Brief*, pp. 6, 17.)

On January 29, 1954, petitioner, by his counsel, supplemented the letter of January 27, stating that if the case were reopened he would prove that he had not knowingly maintained any close or sympathetic association with any member of the Communist Party, that his relations with an organization known as the Nature Friends of America, which constituted four of the five charges, were casual, intermittent and entirely innocent, and in fact that petitioner had specifically refused to become a member of the organization and had only used its facilities for outdoor recreation (Pet.'s Ex. 10, R. 27).

On February 4, 1954, the Secretary wrote petitioner's counsel denying the request for a reopening of his case, but stated: "I have reviewed the information which you have forwarded in support of your request, as well as other available information" (Pet.'s Ex. 11, R. 28). On February 10, 1954, counsel for petitioner again wrote the Secretary requesting reconsideration of the refusal to reopen. In this letter the offer of proof of January 29, 1954, was repeated and amplified. In addition, counsel pointed out the insufficiency of the original charges and questioned the constitutionality of Executive Order 10450 and the Act of August 26, 1950, 5 U. S. C. 22-1, *et seq.*, on which the Executive Order was in part based (Pet.'s Ex. 12, R. 29-31). The Secretary denied this second request on February 24, 1954, saying, "The substantive information of your letter of February 10 was considered at the time of the determination" (Pet.'s Ex. 13, R. 32); and that the separation of Mr. Cole had been accomplished in accordance with Executive Order 10450 and the security regulations of the Department; and that the validity and constitutionality of the Executive Order and the Act of August 26, 1950 (64 Stat. 476), upon which it is based, were not matters to be determined by the Department (R. 32).

On February 25, 1954, petitioner appealed his discharge to the Second United States Civil Service Region, claiming

that his discharge was in violation of Section 14 of the Veterans' Preference Act and the Rules and Regulations of the Civil Service Commission, in that: (1) he was not furnished with any and all of the reasons for his discharge; (2) that said discharge was arbitrary, capricious and not made in good faith; (3) that no notice of any adverse determination ever advised him of his right to appeal to the Civil Service Commission; (4) that the refusal to grant him a "hearing" pursuant to the request of January 27, 1954, as supplemented, was arbitrary, capricious, and not made in good faith; (5) that the refusal to reconsider the denial of the request for the "hearing" pursuant to the request of February 10, 1954, was arbitrary, capricious and not made in good faith (R. 8-9, 39).

On March 3, 1954, the Regional Director of the Second Civil Service Region advised petitioner that he could not accept his appeal inasmuch as "The Commission has held that the provisions of Section 14 of the Veterans' Preference Act of 1944 are not applicable to suspension or termination of preference civilian officers or employees by the various departments and agencies concerned under authority of Public Law 733 (81st Congress, the Act of August 26, 1950)... Accordingly, there is no right of appeal by a preference eligible to the Commission under Section 14 from an adverse action initiated under Executive Order 10450" (Pet.'s Ex. 14, R. 33-34). On May 5, 1954, the decision of the Regional Director was approved by the United States Civil Service Commission, to which it had been appealed (Pet.'s Ex. 15, R. 35-36).

B. Court Proceedings

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring invalid his discharge by the Secretary of Health, Education and Welfare pursuant to the provisions of the Act of August 26, 1950 as purportedly extended by Executive Order 10450,

and for a declaration that the refusal of respondent Young, Chairman of the United States Civil Service Commission, to hear petitioner's appeal from the Secretary's adverse determinations was illegal. Petitioner prayed further for an Order restoring him to his position as a Food and Drug Inspector as of the date of his discharge.

An answer was filed on August 30, 1954. On September 8, 1954, an Order was entered granting petitioner's motion to amend his complaint by adding as parties defendant George M. Moore and Frederick J. Lawton, members of the United States Civil Service Commission. It was stipulated by counsel that the answer which was filed was adopted by the additional defendants.

After the filing of the answer, petitioner and respondents filed cross-motions for judgment on the pleadings. On October 26, 1954, the District Court granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (R. 53). Jurisdiction of the cause in the District Court was based on 28 U. S. C., Sections 1331, 2201 and 2202. The Court of Appeals, by a 2-1 vote, affirmed, Chief Judge Edgerton dissenting (R. 55-63).

Summary of Argument

The issues presented by this case raise questions of fundamental importance to the Government of the United States, our democratic society, and millions of government employees. The decision of the court below removes from government service as a "security risk" a concededly loyal employee who had no access to any government secrets or classified information and who occupied a position not involving the making of policy. Inasmuch as the criteria of Executive Order 10450 (Appendix "A", *infra*, pp. 59-61), cover virtually every aspect of "employee suitability," the decision below deprives thousands of

government employees in non-sensitive positions of the procedural safeguards of the Lloyd-La Follette and Veterans' Preference Acts whenever it is asserted in the name of "security" that they are "unsuitable" for Federal employment.[2]

The issues, which are before this Court for the first time, arise from the Federal Employees' Security Program, based upon the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1 to 22-3). As stated by Chief Judge Edgerton in his dissent below:

> "In the Lloyd-LaFollette Act and the Veterans' Preference Act, Congress limited the President's control over removals (from the classified civil service). No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations 64 Stat. 476, 5 U. S. C. 22-1, 22-3. The question is whether this case is within the exceptions." (226 F. 2d 337, 341.)

On all the questions raised by petitioner below, the Court of Appeals was divided. Petitioner contends, with Chief Edgerton, that the majority erred. His challenge is not premised upon any "right" to federal employment as such, but upon procedural rights enacted by Congress for the protection of civil servants in the Veterans' Preference and Lloyd-LaFollette Acts and in the Act of August 26, 1950, itself. He contends that these rights were violated and that his dismissal was without legal justification.

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[2] There are now approximately 2,300,000 federal employees covered by the security program. From May 28, 1953, through September 30, 1954, 3,002 federal employees were terminated under Executive Order 10450. Of those terminated, 1,645 occupied "non-sensitive" positions. (*Hearings, Senate Subcommittee; Committee on Government Operations on S. J. Res. 21*), 84th Cong., 1st Sess., March 16, 1955, pp. 515, 533, 569-570.

I

The Act of August 26, 1950 (5 U. S. C. 22-1), could not have been applied by the agency head to petitioner, a concededly loyal employee holding a non-sensitive, non-policy-making position in an agency not primarily involved in national defense or security matters; Executive Order 10450, which purported to extend the statute to petitioner, is void in that the President was not authorized by Section 3 (5 U. S. C. 22-3) to extend the provisions of Section 1 of the Act to such an employee. The statute cannot be applied where there is no nexus between the employee's job and the nation's defense, preparedness or similarly related programs.

II

Executive Order 10450, which establishes a rigid, single standard for *all* government employment—irrespective of the degree of the sensitivity of that employment—is in contravention of the statute and void. The power of the President under Section 3 (5 U. S. C. 22-3) is limited to an extension of the provisions of Section 1 (5 U. S. C. 22-1) to agencies and departments not specifically included in that section. Assuming, *arguendo*, the power of the President to extend Section 1 of the Act to each and every agency of the government, he had no power whatever to extend it to *each and every employee* in each and every agency without regard to the sensitivity of the employee's position. The extent to which the statute was to be applied within any particular agency was left specifically by Congress to the discretion of the agency head concerned. Executive Order 10450, which establishes "clearly consistent with the interests of the national security" as the mandatory single standard for all government employment, effectively divested the agency head of statutory discretion in security matters. This is clear from the *conceded* facts. Petitioner was loyal; he had no access to classified information or government secrets; he did not occupy a policy-making position. Accordingly, petitioner's continuing

association with alleged "subversives" could not possibly result in the disclosure of "secret" or "classified" information or material. His discharge, therefore, could not conceivably have been justified as "necessary or advisable in the interest of the national security." Either the agency head was divested of statutory discretion by the mandatory requirements of the Executive Order, or petitioner's discharge under the statute was patently arbitrary and discriminatory.

III

The statutory standard of employee discharge provides that the agency head "may" discharge an employee when, in his discretion, such action is "necessary or advisable in the interest of the national security" (5 U. S. C. 22-1). The standard of employee discharge of Executive Order 10450 is that no employee shall be retained in employment unless retention is affirmatively established to be "clearly consistent with the interests of the national security." This latter standard is made applicable by the Executive Order to each and every employee of the federal government, irrespective of the sensitivity of the employee's position. The change from the "necessary or advisable" standard of the statute to the "clearly consistent" standard of the Executive Order is the adoption of a more rigid test of suitability for federal employment, contemplating the possible existence of information which, while not capable of inducing a belief that an employee's dismissal is "necessary or advisable in the interest of the national security," does cause doubt as to whether his continued employment is "clearly consistent with the interests of the national security." Therefore, to the extent that the Executive Order cuts off petitioner's rights under the Veterans' Preference and Lloyd-LaFollette Acts, it is inconsistent with the statute and void.

IV

Apart from any other consideration, the Act of August 26, 1950, Section 1, as extended to the Department of Health, Education and Welfare by Executive Order 10450, requires that an employee who is terminated receive "a written statement of the decision of the agency head." The decision of the agency head on January 15, 1954, terminating petitioner's employment effective January 20, 1954, failed to set forth any of the reasons for the adverse determination except to refer to the letter of charges and petitioner's refusal to reply thereto. This notification was not in compliance with the Act of August 26, 1950's statutory proviso (5 U. S. C. 22-1) requiring the receipt by the employee of "a written statement of the decision of the agency head."

ARGUMENT

I

The Act of August 26, 1950, was invalidly extended by Executive Order 10450 to petitioner and was invalidly applied by the agency head to remove him—a loyal employee doing non-security work in a non-sensitive agency.

Kendrick M. Cole is an honorably discharged veteran who, prior to January 20, 1954, held a permanent position in the classified federal civil service as Food and Drug Inspector. His job consisted of inspecting and sampling foods, drugs and cosmetics for conformity to federal regulatory standards.[3] This work did not involve or affect the

[3] In addition to factory inspection, such inspectors frequently take samples of the inspected item to Food & Drug Administration laboratories for more precise analysis and testing. See *Inspectors Manual*, Food & Drug Administration (U. S. Government Printing Office, 1945, as supplemented).

formulation of public policy, nor did it entail access to classified government material or other state secrets (R. 40). It was a demanding, highly skilled, but undramatic job which petitioner ably performed until the time of his termination. Moreover, it is admitted that his loyalty to the United States was never in question even at the time of his discharge. Accordingly, it is clear that petitioner's removal "in the interest of the national security" was invalid.

Petitioner was an "inferior official" within the meaning of the second clause of Article II, Section 2 of the Constitution. Congress, having vested his appointment in the department head (the Secretary of Health, Education and Welfare), could also prescribe the conditions of his removal. *See United States* v. *Perkins*, 116 U. S. 483. It did so in Section 6 of the Lloyd-LaFollette Act,[4] Section 14 of the Veterans' Preference Act,[5] and in the Act of August 26, 1950, at issue here.

Both the Lloyd-LaFollette Act and the Veterans' Preference Act provide that members of the classified civil service shall be suspended or removed only for causes which will promote the "efficiency of the service". Under these laws they are entitled to notice of the charges against them, a reasonable time in which to answer, a written decision stating the reasons for suspension or removal, if that action is taken, and, in the case of veterans' preference eligibles, such as petitioner, the right of appeal to the Civil Service Commission (including personal appearance or appearance by counsel before the Commission), whose decision is made binding on the employing

[4] Section 6 of the Act of August 24, 1912, 37 Stat. 555, as amended, 5 U. S. C. 652.

[5] Section 14 of the Act of June 27, 1944, 58 Stat. 390, as amended, 5 U. S. C. 863. See 5 C. F. R., §§ 22.1 to 22.11.

agency.[6] If petitioner had been terminated for the efficiency of the service, he would have been entitled to these procedural rights.[7]

In the Act of August 26, 1950, Congress created a limited exception to the Lloyd-LaFollette and Veterans' Preference Acts by providing that the heads of certain departments and agencies named in Section 1 of the Act (5 U. S. C. 22-1) might in their absolute discretion suspend and thereafter, "when necessary or advisable in the interest of the national security," terminate any officer or employee in those departments. This statute drastically reduced the procedural protections to civil servants in cases where it applied. First, it provided for suspension prior to the issuance of charges. Second, it stated that charges should be stated only as specifically as security considerations permit. Finally, it cut off the employee's right to appeal to the Civil Service Commission, by providing that the decision of the agency head (required in all termination cases) "shall be conclusive and final."

Only certain "sensitive" agencies were named in Section 1 of the 1950 statute, and the Department of Health, Education and Welfare was not among these. However, by Section 3 of the Act (5 U. S. C. 22-3), the President was authorized to extend the substantive provisions of Section

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[6] Under Section 15 of the Veterans Preference Act, 5 U. S. C. 864, any employee fired for reasons other than "delinquency or misconduct," as was petitioner, may request the Commission to have his name placed on civil service registers and employment lists for reemployment in another position for which he is eligible.

[7] Even under the so-called "loyalty program," Executive Order 9835, 12 F. R. 1935 (May 27, 1947) as amended by Executive Order 10241, 16 F. R. 3690 (May 1, 1951), revoked by Executive Order 10450 (April 27, 1953), the court below had held that a veteran terminated on loyalty grounds was nonetheless entitled to the procedural protections of Section 14 of the Veterans' Preference Act. *Kutcher* v. *Gray* (C. A. D. C.), 199 F. 2d 783.

1 to such other departments and agencies as from time to time he might "deem necessary in the best interests of national security." With one minor exception,[8] he did not exercise this authority until April 27, 1953. Therefore, from August 26, 1950, to April 27, 1953, although the loyalty program was still in effect throughout the government, the provisions of the 1950 statute had not been made applicable to the Department of Health, Education and Welfare which employed petitioner.

On April 27, 1953, the President, "deeming such action necessary in the best interests of the national security" (Preamble, Executive Order 10450), ordered that the provisions of the Act "shall apply to all other departments and agencies of the government." He also specifically purported to extend the Act's coverage to each and every civilian officer and employee of the Executive Branch under the standard—"clearly consistent with the interests of the national security"—and thus did away with any rights petitioner might otherwise have had under the Veterans' Preference Act and the Lloyd-LaFollette Act (37 Stat. 555, 5 U. S. C. 652).

However, the text of the Act of August 26, 1950, plainly shows that the statute could not validly have been applied to petitioner *either by the agency head or the President's Executive Order*. The crucial standard for application of the Act's provisions is contained in the phrase, "in the interest of the national security," for it is only this interest which can justify suspension (when "necessary" in that interest) and termination (when "necessary or advisable" in that interest) of employees pursuant to the statute.

On the face of it, this standard, "the interest of the national security," is not free from vagueness; it allows

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[8] By Executive Order 10237, 16 F. R. 3627, President Truman extended the provisions of the Act to the obviously "sensitive" Canal Zone.

for executive judgment in doubtful cases. Yet, it is obvious that that interest is by definition limited to cases where there is a rational relationship between the employment in question and the actual security of the nation. On the conceded facts, this is a case beyond those limits. Indeed, nowhere in this case have respondents been willing or able to indicate how petitioner's continued employment could not have been "clearly consistent with the interest of national security," as the Secretary stated in terminating him. Yet, it bears repeating, it was only in the "interest of the national security" that the Secretary was authorized to dismiss him under the 1950 act.

In the light of these considerations and of the plain wording of the statute itself, the Act of August 26, 1950, cannot be read as giving carte blanche authority for the cashiering of petitioner and others like him without regard to the actual interest of the national security. We believe this Court need go no farther than the text of the Act to reach that conclusion, and thus find that the court below erred and that petitioner was invalidly terminated. This conclusion is not based on semantics alone, for Congress had an unmistakable purpose in passing the Act of August 26, 1950. That purpose was the creation of a permanent legislative authority for the summary dismissal of employees whose character, personality and background, *when considered relationally to the sensitivity of their employment*, rendered it necessary or advisable that they not be allowed to continue holding jobs which were vitally involved in our national defense and preparedness programs. That purpose, as we shall show, emerges strongly and clearly from the statute and its legislative history, and just as it was the justification for the authority, so it is also the measure of that authority; for it is elementary that "Official powers cannot be extended beyond the terms and necessary implications of the grant," *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 649. See also *Stark* v. *Wickard*, 321 U. S. 288, 309.

A. The "Congressional Purpose"

The Act of August 26, 1950, was enacted to *supplement* the "Loyalty Program" (Executive Order 9835, 12 F. R. 1935) in agencies concerned with vital matters affecting the national security, *H. Rep. No. 2264*, 80th Cong., 2nd Sess., p. 2 (1948). This is made clear by the report of the Armed Services Committee of the Senate, *S. Rep. No. 2158*, 81st Cong., 2nd Sess., pp. 1-2 (1950), which stated:

> "The purpose of the bill is to increase the authority of the heads of Government Departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks. * * * It will be noticed that the bill, as amended, is not designed to set aside the President's loyalty program. It is intended that this program will be continued. Executive Order 9835 of March 21, 1947, established procedures under which employees found to be disloyal, as distinct from poor security risks, could be removed from the Federal Government. This bill is concerned primarily with the problem of dealing with those employees who, although loyal, are so careless as to jeopardize the national security. Disloyal persons should not be permitted to be employed in the Federal service under any circumstances. They are not entitled to Federal employment of any kind."

1. The Standard of Coverage

The Act of August 26, 1950, in providing that a stated group of department and agency heads "may, in (their) absolute discretion and, when deemed necessary [or advisable] in the interest of national security, suspend, [and thereafter terminate] any civilian officer or employee * * *" is *permissive* in application. The use of the word "discretion" leaves little doubt that Congress intended the Agency Head to make the sole determination as to the extent of the Act's application within his own agency. The only limitation on the agency head is the Congressional requirement that his discretion be exercised only when

"necessary or advisable in the interest of the national security."

The Act of August 26, 1950, mentions the President only twice: Section 3 (5 U. S. C., 22-3), provides that the Act shall apply to agencies and departments other than those referred to in Section 1, "as the President may, from time to time, deem necessary in the best interests of national security," and that the President shall report to Congress on any such extensions to other agencies and departments. For the rest, the statute is a direct grant by Congress to the agency and department heads covered under it. The President is given no authority to limit, vary or enlarge this grant, nor is he authorized to divest an agency head of his discretion to determine, under the legislative standard—"when necessary or advisable in the interest of the national security"—the extent of the Act's coverage within the confines of his own department.[9]

2. The Standard of Employee Termination

Section 1 of the Act of August 26, 1950, establishes the standard to be followed by an agency head in determining whether a particular employee should be retained or terminated. The standard is set forth in the statute as follows:

> "The agency head concerned *may*, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine *such termination necessary or advisable in the interest of the national security of the United States* • • •" (Emphasis supplied.)

The standard of termination, like the standard of coverage, is *permissive* in application, depending upon the

[9] See *e.g.*, testimony of Assistant Attorney General Tompkins before the *Senate Subcommittee on Government Operations on S. J. Res. 21*, 84th Cong., 1st Sess., March 18, 1955, pp. 59-60.

"sensitivity" of the employee's position. As explained to the Senate Armed Service Committee by Felix Larkin, then Defense Department General Counsel:

> "If the question is discharge for loyalty reasons, of course he is disqualified from being reemployed any place else. If he were to be terminated by a sensitive agency like Defense, as herein provided for security purposes, not for loyalty but for security, he is being terminated by us because we cannot find a nonsensitive job for him in our agency. If we find a person who we feel is a security risk because he happens to be handling classified material, we will attempt to find him a nonsensitive job where he is not a security risk," (*Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, p. 13).

Congress was informed that the statute would give agency heads latitude in safeguarding national defense secrets for which the agency heads alone were responsible. Termination or transfer was to be dependent in each case upon the relative sensitivity of the employee's position and the possibilities of reemployment within the agency in a nonsensitive position.

> "The Secretary of one of these departments dealing with national defense secrets is responsible for the quality of the administration of his department and its security requirements to a unique degree. When an employee * * * is likely to be a poor security risk, the responsibility for deciding the proper action rests with that secretary. * * * An indiscretion by a civilian employee in one department might be of no significant consequence elsewhere. Within a department there would be degrees of security and variations in attendant risks." (Dan A. Kimball, Undersecretary of the Navy, testifying before the *House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, at pp. 69-70.)

Congress accordingly vested sole discretion in the agency head to determine whether an employee should be terminated, transferred or retained. The only Congressional limitation on the agency head's discretion to terminate is the requirement that its exercise be "necessary or advisable in the interest of the national security."

B. The Legislative Background

The Bill which eventually became the Act of August 26, 1950, was first introduced in the Senate during the 80th Congress (S. 1561). During the Hearings before the Senate Armed Services Committee, Arthur Fleming, a member of the Civil Service Commission, pointed out that S. 1561 would destroy the appeal rights of veterans under Section 14 of the Veterans Preference Act and that the Committee should be careful not to extend its coverage to government agencies not directly involved in national security matters, *Hearings, Senate Armed Services Committee on S. 1561,* 80th Cong., 2nd Sess., Feb. 27, 1948, pp. 14-16. Thereafter, the Bill was amended in committee to permit the President to determine "additional" sensitive areas and to include them within its scope. *S. Rep. No. 1155,* 80th Cong., 2nd Sess., p. 3 (1948). In explaining the amendment, the committee stated:

> "Insofar as * * * [this] Amendment is concerned, it was recognized by all witnesses that there were other sensitive areas within the various departments of the Government which are now or might in the future become, deeply involved in national security. After considerable discussion, it was agreed that it would be impossible to name all such agencies but it was felt that the bill should be specifically broadened to include other agencies of the Military Establishment. * * * The National Advisory Committee for Aeronautics requested that they be included and because of the nature of their work, it is believed that they are vitally connected with the defense structure and it was proper to specifically include

> them. * * * In view, however, of the fact that there are now and will be in the future, other sensitive areas of equal importance to the national security, it is believed that the President should have authority to make a finding concerning such areas and by Executive action place those areas under the authority contained in this Act." *S. Rep. No. 1155, supra*, at p. 4 (1948).

The Bill failed to pass the House because of lack of time and was reintroduced as H. R. 7439, 81st Congress, 2nd Session, having been drafted by the Defense Department and introduced at its request, *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 1950, pp. 2, 3.

1. Restriction to Sensitive Areas

The restrictive purpose of the Act was stated in the House Committee Report. (*H. Rep. No. 2330*, 81st Cong., 2nd Sess. (1950), p. 4), as follows:

> "The Bill does not deal with the suspension or removal of disloyal Federal employees * * *. This bill is concerned with the all-important problem of dealing with those Federal employees who although loyal to the United States, act in a manner which jeopardizes national security, either through wanton carelessness or general disregard for the public good."

See also: *S. Rep. No. 2158*, 81st Cong., 2nd Sess. at p. 2 (1950).

Those described in the aforementioned Report were not the only persons who might, when employed in sensitive positions, be security risks:

> "Senator Bridges: People like a drunkard or a sexual pervert?

> "The Chairman: Or a person who talks and talks and talks.
>
> "Mr. Larkin: Or a person who associates with persons who belong to the Communist Party or any of the agencies on the Attorney General's list, but against whom there is no proof he is a Communist as such himself but who by virtue of his continued association becomes a tremendous risk for us to keep in a sensitive job where he is continually every day getting highly classified material." *Hearings, Senate Committee on Armed Services, on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, p. 8.

The similarity of the last hypothetical to the charges against petitioner is striking, *except that petitioner held no sensitive job.*

Of course, *disloyal* persons were also security risks *insofar as they worked in sensitive positions.* Mr. Larkin put it thus:

> "They are security risks because of their access to confidential and classified material * * *. But if they do not have access to classified material, why, there is no notion that they are security risks to the United States." *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, at p. 67.

This was quite apart from their general undesirability as federal employees, for their dismissal on the latter ground required a full observance of their procedural rights under the Lloyd-LaFollette and Veterans' Preference Acts, *Kutcher* v. *Gray* (C. A. D. C.), 199 F. 2d 783; *Bailey* v. *Richardson* (C. A. D. C.), 182 F. 2d 46, affirmed by an equally divided Court, 341 U. S. 918. However, it was iterated and reiterated throughout the history of the bill that such persons were only dangerous because of their access to classified material or their ability to make or

strongly influence policy.[10] See, e.g., *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 23, 30, 1950, pp. 10, 18, 21, 25, 41, 43, 60, 67, 89; *Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, pp. 7, 8, 17; House Debates, 96 C. R. 10016, 10017, 10019, 10026.

2. Procedural Limitations

It was this very fact, that the Act of August 26, 1950, was limited to sensitive positions and that it authorized dismissal only "in the interest of the national security" (rather than in the name of some vague feeling that *all* federal employees ought to be of clean character and stolid habits), that explained the lack of an appeal procedure in the statute. Amendments which would have provided for an appeal by a dismissed employee to an outside review agency were defeated in the House of Representatives *96 C. R. 10017 ff.* principally because such a review would involve the divulgence of the very secrets intended to be protected under the statute:

> *"Of course we want to have an appeal to an independent board by employees who are not doing sen-*

[10] Captain McDill, Navy Department Director of Legislation, stated:

> "The type of case [covered by] * * * the authority [of] this measure are those infrequent situations where the employee involved *occupies a key position or a position of trust*, and where the evidence at hand is sufficient to require continuing surveillance and where the evidence raises a serious question as to the individual's fitness and reliability *from a security standpoint in such a position* as he currently occupies. For example, sobriety, discretion, trustworthiness, selection of friends and acquaintances, and the entire sphere of an individual's activities are factors which must be given thorough scrutiny when a person *occupies a key position or one of trust involving access to or connection with classified material.*" *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 1950, p. 19 (Emphasis supplied.)

> *sitive work and who are not doing highly secret defense work*; but employees doing highly secret work in our defense agencies are in a different category." *96 C. R. 10017*, Remarks of Rep. Murray.[11] (Emphasis supplied.)

The intent to limit the Act of August 26, 1950, to sensitive employment was reflected in other features of the statute, *e. g.*, the fact that the Act only applied originally to certain obviously crucial agencies and was only to be extended as *necessary* in the best interests of national security; the limitation on the disclosure of charges against an employee (*i. e.*, only "as security considerations permit"); the provision for the reemployment of dismissed employees in other capacities with the approval of the Civil Service Commission, *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 2 (1950); *H. Rep. No. 2330*, 81st Cong., 2nd Sess., p. 4 (1950).

The sum of these procedural limitations, justified solely by the premise that dismissals under the statute would involve inquiry into questions of national security, is the essence of the difference between the Act of August 26, 1950, and the Lloyd-LaFollette and Veterans' Preference Acts.

For the very same reason, the Act of August 26, 1950, was intended to be applied only where necessary for security reasons by reason of the nature of the job, *i. e.*, its sensi-

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[11] Mr. Larkin explained the opposition of the Department of Defense to an independent agency review of "security risk" dismissals as follows:

> "I think by setting up a review agency of this kind it means that they have to then go in and determine the sensitivity of the job, they have to find out the types of classified material that are alleged to be classified, and what they are—they have to go into a lot of matters of that character which I think not only complicates it, but I think they have no right to go into." *Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, p. 29.

tivity.[12] *All* other employees, regardless of the nature of the charges against them, were entitled to their full procedural rights under the older statutes.

C. Administrative Construction Prior to Executive Order 10450

The aforestated basic purpose and limitation in the statute was fully understood in the Executive Branch. As we have demonstrated heretofore, it was the Defense Department which drafted the original bill that became the Act of August 26, 1950, and officials of that Department first explained the meaning and contemplated operation of the proposed law. They were unanimously of the opinion that it could apply only to sensitive positions or sensitive agencies. Indeed, even prior to the passage of the Act, these witnesses testified that the Department of Defense had by its own security regulations distinguished between sensitive and non-sensitive jobs. What they sought in proposing H. R. 7439 was permanent authority for these regulations (see House and Senate *Hearings* throughout, *e. g.*, testimony of Messrs. Larkin, Kimball, Goodrich, Klein).

After the passage of the Act of August 26, 1950, the regulations adopted by the Defense Department, effective January 19, 1951, explicitly took into account the distinction between "sensitive" and "non-sensitive" positions within the Department itself. *Department of Defense Security Regulations, Section 3(a),* (quoted in Bontecou,

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[12] Some members of the Senate Armed Services Committee thought the bill should be applicable to all government employment. *Hearings, Senate Committee on Armed Services on H. R. 7439,* 81st Cong., 2nd Sess., July 20, 1950, p. 13. The General Counsel of the Department of Defense, who had drafted the bill, took sharp issue with this assertion. (*Hearings, supra,* pp. 15, 17). The decisive fact, of course, is that the bill, as reported and finally passed, did not apply to all Federal employment. Senator Hunt's motion to amend the bill to provide that the provisions of the law "shall apply to all other departments" (*id.*, at p. 25), was defeated in committee (*id.* at p. 26).

"The Federal Loyalty-Security Program," [New York, 1953] at p. 349). The rule was applied by the Defense Department prior to the promulgation of Executive Order 10450, even when the employee was accused of disloyalty; disloyal employees in sensitive jobs being processed simultaneously under Executive Order 9835 (12 F. R. 1935) and the Act of August 26, 1950. *Department of Defense Security Regulations, Section 2(b),* (quoted in Bontecou, *supra,* at p. 349).

Thus, an employee "cleared" on loyalty grounds might have been terminated under the Act of August 26, 1950—but only where he held a "sensitive", or other key position, within the Defense Department itself.[13]

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[13] This was explained in Committee by Messrs. Larkin and Kimball:

"Mr. Larkin. * * *A person is accused of being disloyal, but is cleared by the loyalty board, because there is not enough evidence against him. If that person is not in a sensitive job, it is not of any further concern to us. We are willing to take the view, that while we might have misgivings about his loyalty, he cannot prejudice our security because he does not have access to any of the classified or top secret material.

"Mr. Miller. The point is that here is a case where a man is accused of being disloyal. He is brought before the loyalty board. You cannot make the charge stick, so now you are going to get him through this other process?

"Mr. Larkin. If his job happens to be a sensitive job.

"Mr. Kimball. Let me give you an illustration. We had a fellow working who was accused of disloyalty and cleared of it. But he was married to a woman whose family around him were all Communists. He associated with those people all the time. We could find nothing disloyal about him. We were not even sure that he was a bad security risk except that he was associating with Communists. So we offered him a position in another part of the country, where he would not have access to the kind of material he might have access to here. He took it and we were satisfied. We just moved him away from here. But if he had not been willing to move, we must have the power to remove him from our rolls, because we would not keep a fellow there that was associating with Communists." *Hearings, House Committee on Post Office and Civil Service on H. R. 7439,* 81st Cong., 2nd Sess., March 30, 1950, pp. 72-73.

One of the most considered administrative explanations of the statute is contained in "*A Report By the Inter-Departmental Committee on Internal Security on the Government Employee Security Program,*" April 29, 1952, (White House Mimeograph Release No. 3326, August 8, 1952), hereafter referred to as "*The Report on the Security Program.*" Relevant portions of the *Report* are set forth in Appendix "B" of this brief, *infra*, pp. 62-66.

In substance, "*The Report on the Security Program*" defines "the interest of national security" as used in the Act of August 26, 1950, solely in relation to the safeguarding of the United States against attempts to destroy or weaken it by force or violence, subversion, or any other means. The areas to be safeguarded are military, foreign relations, and related matters of the government, the disclosure or compromise of which would aid the enemies of the United States or would endanger its defense. The *Report* makes it clear that:

> "the term national security does not include questions of policy or judgment with respect to other governmental matters relating to the general welfare, health and happiness of our people in their economic and political life, not requiring security classification" (*infra*, at pp. 65-66).[14]

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[14] Cf. and compare the definition of "national defense" as used in the Espionage Act of 1917, 18 U. S. C. 791, *et seq.*: *Gorin* v. *United States*, 312 U. S. 19; *Heine* v. *United States* (2 Cir.), 151 F. 2d 813, cert. den., 328 U. S. 833; *Slack v. United States* (6 Cir.), 203 F. 2d 152, 155-156, cert. den., 346 U. S. 140; *Posen* v. *United Aircraft Products*, 201 Misc. 260, 111 N. Y. S. 2d 261. See also the doctrine of evidentiary privilege against disclosure of matters involving military affairs: *United States* v. *Reynolds*, 345 U. S. 1; *United States* v. *Coplon* (2 Cir.), 185 F. 2d 629, 640, cert. den., 342 U. S. 920; *Ticon Corp.* v. *Emerson Radio & Phonograph Corp.*, 206 Misc. 727, 134 N. Y. S. 2d 716; *Wigmore on Evidence* (3d Ed.), Vol. 8, Sec.'s 2378(a), 2379; Newman, "*Control of Information Relating to Atomic Energy*," 56 Yale L. J. 769, 787-792.

Thus, both the legislative and executive branches of the government recognized that the Act of August 26, 1950, which provides for the suspension and termination of government employees when necessary or advisable "in the interest of the national security," does not deal with employees holding non-sensitive, non-policy-making positions in agencies not primarily involved in vital defense or national security matters. *S. Rep. No. 2158*, 81st Cong., 2nd Sess., pp. 1-2 (1950); *H. Rep. No. 2330*, 81st Cong., 2nd Sess., pp. 1-4 (1950); *H. Rep. No. 2264*, 80th Cong., 2nd Sess. p. 2 (1948). They were fully aware that it applies only to employees who, intentionally or inadvertently, might harm the nation's security interests by virtue of the sensitivity of the positions held, *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 23, 30, 1950, pp. 19-21, 25-26, 60, 64-65, 67-68, 69-73, 88-89; *A Report by the Inter-Departmental Committee on Internal Security on the Government Employee Security Program*, April 29, 1952 (White House Mimeograph Release No. 3326, August 8, 1952, pp. 13-16, 27).

Apart from this recognition by the legislative and executive branches, the application of the "security" program to "sensitive" positions, as distinguished from "non-sensitive" ones, has been widely recognized elsewhere.[15] According to Miss Eleanor Bontecou, perhaps the leading writer in the field:

> "The security question arises and the judgment on it is made only in connection with positions which are classed as 'sensitive'; that is, where an employee may in fact have access to secrets, or be able to influence policy against the interests of his own country. A security judgment is a relative one. Some positions are more sensitive than others, and

[15] This recognition has been adopted and is clearly spelled out in New York State's Security Risk Law (L. 1951, ch. 233), *McKinney's Unconsolidated Laws of New York*, Section 1101, *et seq.*

> the more important the secret to which an employee may have access the stricter must be the tests applied." (Bontecou, *"The Federal Loyalty-Security Program"* [New York, 1953], pp. 48-49.)

There is no question that a disloyal employee in a "sensitive" position is an "aggravated security risk" (Bontecou, *supra*, at pp. 50-51), but a Food and Drug Inspector who is accused of maintaining a "sympathetic association" with Communists and donating funds to the "Nature Friends of America" presents no risk to "security" where the position he holds is "non-sensitive." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 181-182 (Douglas, J., concurring). Mr. Justice Steuer of the New York Supreme Court put it thus:

> "It is a bit difficult to visualize how a wash room attendant in his official capacity can give aid to his country's enemies." (*Application of Pinggera*, 206 Misc. 615, 134 N. Y. S. 2d 166, 168.)[16]

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[16] See also: *Fitzgerald* v. *Sperry Gyroscope Co.*, 22 L. A. 186, aff'd 283 App. Div. 1036; *Sperry Gyroscope Co.* v. *Engineers Association*, 106 N. Y. S. 2d 597, 599, rev'd on other grounds, 278 App. Div. 630, aff'd 304 N. Y. 582; *Fitzgerald* v. *City of Philadelphia*, Penn. Comm. Pleas Court, No. 6212, Sept. Term, 1952, *"New York Times,"* May 5, 1953, aff'd 376 Pa. 379, 102 A. 2d 887. The non-judicial authorities are in accord: Bontecou, *supra*, at pp. 48-49; Brown, *"The Operation of Personnel Security Programs,"* ANNALS, American Academy of Political and Social Science (1955), pp. 77-78; *Goldbloom, "American Security and Freedom"* (New York, 1954), pp. 32-34; *"Loyalty in a Democracy," Public Affairs Pamphlet* No. 179 (New York, 1952), at p. 6; Emerson and Helfeld, *"Loyalty Among Government Employees,"* 58 Yale L. J. 1, 136-137; Jahoda and Cook, *"Security Measures and Freedom of Thought,"* 61 Yale L. J. 295, 300-301; *XI, Bul. of Atom. Scientists*, April, 1955, pp. 110-11, 121, 146, 163.

D. Necessity for Restrictive Construction

This Court has repeatedly held that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." *United States v. Jin Fuey Moy*, 241 U. S. 394, 401. See also: *United States* v. *Rumely*, 345 U. S. 41, 45. Accordingly, we press the constitutional argument as an aid to statutory construction.

In *Ex parte Mitsuye Endo*, 323 U. S. 283, this Court held that an American citizen of Japanese descent whose loyalty was conceded could not constitutionally be held in a War Relocation Center, but must be unconditionally released. The Court found that the wartime evacuation and detention program, established to provide for the removal of persons from designated areas when "necessary in the interests of the national security" (*id.* at p. 300). was an emergency measure for the protection of the war effort against espionage and sabotage. "A citizen who is concededly loyal presents no problem of espionage or sabotage * * *. He who is loyal is by definition not a spy or a saboteur" (*id.* at p. 301).

Obviously, since it is conceded that petitioner had no access to "classified information" or Government secrets and was not in a policy-making position (R. 40), associations with alleged "subversives" could not result in petitioner's *inadvertent* disclosure of secret information to a potential enemy. Inasmuch as it was conceded below that petitioner is not alleged to be disloyal, he could not, by definition, be deemed a potential saboteur of the food supply. Neither espionage, nor sabotage, nor inadvertent disclosure of "classified information" is involved in petitioner's case. Consequently, it is not even "within the realm of possible contemplation" that his discharge could have been justified as "necessary or advisable in the interest of the national security." Rather, it is clear that his

discharge under the authority of 5 U. S. C. 22-1 was patently arbitrary and discriminatory. *Wieman* v. *Updegraff*, 344 U. S. 183, 192.

If, as held by the majority below (226 F. 2d 337, 339), the "plain meaning" of the statute authorized petitioner's discharge on these conceded facts, the statute is unconstitutional. The "grounds" on which petitioner was terminated under the statute charged him with acts of *association* only (Pet.'s Ex. 3, R. 16-18). Allegations of "close association" with individuals "reliably reported" to be Communists, and a "sympathetic association" with a "subversive" group of nature lovers cannot, in the light of the First Amendment, exclude from public employment an otherwise loyal employee occupying a "non-sensitive" job in a "non-sensitive" agency. Cf. *Schneiderman* v. *United States*, 320 U. S. 118, 136; *Hague* v. *C. I. O.*, 307 U. S. 496; *American Communications Ass'n* v. *Douds*, 339 U. S. 382. Moreover, the "grounds" for dismissal are unconstitutionally vague and uncertain. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, at p. 176 (Douglas, J., concurring); *Burstyn* v. *Wilson*, 343 U. S. 495.

The Act of August 26, 1950, could not have provided a constitutional basis for petitioner's termination on the facts of his case. Accordingly, and in line with its settled policy of restrictive statutory construction to avoid unconstitutionality, this Court must hold, if possible, that the Act of August 26, 1950, is not applicable to petitioner, a concededly loyal employee holding a non-sensitive, non-policy-making position in a non-sensitive agency. We think it clear that there is ample authority for the restrictive construction urged by petitioner. Indeed, not only is that construction possible, but necessary, for the construction of the statute by the court below is "plainly at variance with the policy of the legislation as a whole." *United States* v. *American Trucking Associations, Inc.*, 310 U. S.

534, 543. Cf. *Cox* v. *Roth*, 348 U. S. 207, 209. If the Executive Order is viewed merely as a blanket extension of the authority contained in Section 1 of the statute, this issue is focused on the Secretary's application of the statute to petitioner to terminate him pursuant to its provisions. Petitioner contends that the Secretary did not validly apply the statute to him and that, therefore, he was wrongfully denied his rights under the Lloyd-LaFollette and Veterans' Preference Acts. As previously noted, the text of the statute shows that it cannot be applied to petitioner, for the crucial standard for application of its provisions is contained in the phrase, "in the interest of the national security."

The court below did not deal in terms with this elemental question. Rather, it merely held that the discretion vested in the President under Section 3 of the Act permits him to extend its provisions to additional departments and, in doing so, he makes the statute applicable to all employment within these departments (226 F. 2d 337, 339, 340). But the court below erred in reading the statute as giving the President himself the power to dismiss individual employees (226 F. 2d at p. 340), for the text of the law plainly shows that it did not and he could not have validly assumed it. *United States* v. *Perkins*, 116 U. S. 483; *Eberlein* v. *United States*, 257 U. S. 82. Petitioner does not, of course, contend that the Secretary did not have the power to remove him for valid cause promotive of the efficiency of the service. Neither does he contend that the charges made against him could never, under any conceivable circumstances, be the basis for such removal, although obviously that question is premature and entirely conjectural in the context of this case. What he does contend is that there could be and was in fact no basis for his summary unappealable dismissal on the basis of these charges "in the interest of the national security."

The discretion vested in the Secretary by the statute and Executive Order was only discretion to act within the terms

of the statute (see Point II, *infra*). Moreover, it was subject to the condition that it could not be arbitrarily exercised. The majority in the court below ignored these limitations, for not only did the Secretary exceed her statutory discretion, but the decision to terminate petitioner in the name of a reason which simply did not apply to his case was patently arbitrary in the very sense of this Court's holding in *Wieman* v. *Updegraff*, 344 U. S. 183, 192.

The importance of the prohibition against arbitrariness is particularly emphasized in the case of public servants discharged as "security risks." In *Wieman, supra,* at p. 191, this Court noted the deep and lasting stigma attaching to persons dismissed from public service for such reasons, and in *Peters* v. *Hobby*, 349 U. S. 331, 347, it stated that "substantial rights affecting the lives and property of citizens are at stake." They are at stake here, too.

E. Appraisal and Summary

The defects in a man's character or the allegations against his friends are wholly irrelevant under the Act of August 26, 1950, unless he is in a position where such factors can hurt the national security. The law was not enacted to police the character and conduct of the civil service, for it was not intended to apply throughout the government. This is made clear in "*The Report on the Security Program*" (Appendix "B," *infra* at pp. 63-64):

> "Obviously, it was the intention of the Congress to limit the application of that authority to those departments and agencies whose employees, in the performance of their duties, might be in a position to endanger or compromise the national security. The term 'national security' is not defined in the law. It is clear, however, that the term does not relate to *all* functions and activities of the Federal Government; if so, the law would have been applicable to all departments and agencies."

On the conceded facts, the extraordinary authority granted agency heads by the Act of August 26, 1950, could not be used to discharge petitioner summarily on the grounds of security. If his discharge on some other ground or under some other authority was desired, he was entitled to all of the procedural rights provided him by the Veterans' Preference and Lloyd-LaFollette Acts. In creating an exception to those rights, Congress had the power to limit the exception as it previously had the power to create the rights thus excepted to. Yet in firing petitioner pursuant to the mandate of Executive Order 10450, the agency head ignored the plain limitations of her statutory authority. If the Secretary was free to do so, then the Executive is at liberty to ignore any Congressional limitation on the manner in which it may fire employees, and civil service laws can be repealed by Presidential fiat. The text of the statute, the intent of Congress as manifest in the history of the law, the common understanding of the Act as evidenced by considered administrative interpretations and by the obvious connotation of the words, "interest of the national security," all urge the same conclusion: the statute cannot be applied where there is no functional relation between the employment and the nation's defense, preparedness, and similarly related programs.[17]

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[17] Compare English policy as to Communists and Fascists in the civil service. Bontecou, *"The English Policy as to Communists and Fascists in the Civil Service,"* 51 Col. L. Rev. 564-586. The English program is limited to "work, the nature of which is vital to the security of the State" or "in current jargon, in connection with work that would involve access to 'secret' or 'top secret' material." Bontecou, *"The Federal Loyalty-Security Program"* (New York, 1953), p. 263; Biddle, *"Subversives in Government,"* ANNALS, American Academy of Political and Social Science, 1955, Vol. 300, p. 51, 59-60; Wilson and Glickman, *"The Problem of Internal Security in Great Britain, 1948-1953"* (New York, 1954), Chapter 2.

II

Executive Order 10450, which establishes a single minimum standard for all federal employment, was in excess of the Presidential authority conferred by Section 3 of the Act (5 U. S. C. 22-3) and invalidly precluded the agency head from exercising statutory discretion in petitioner's case.

As noted previously (Point I A, *supra*), the authority of the President under Section 3 of the Act of August 26, 1950 (5 U. S. C. 22-3) was limited solely to an extension of the statute to agencies not specifically included within its terms. Section 1 of the Act (5 U. S. C. 22-1), is *permissive* in application both as to "coverage" and "termination." However, a comparison of these permissive and discretionary statutory standards (pp. 17-20, *supra*), with the mandatory provisions of the Executive Order (see Executive Order 10450, Sections 4, 5, 6, 7), discloses that the discretionary standards of the statute have been transformed into the mandatory requirements of the Executive Order.

An assertion that Executive Order 10450 does not ignore the relative sensitivity of various positions in the executive branch of the government totally ignores the key section of that order—Section 7—which provides:

> "Any person whose employment is suspended * * * under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, * * * shall not be reinstated or restored to duty or reemployed in the same department or agency * * * unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security * * *."

Therefore, the discretion directly vested by Congress in agency heads to suspend, terminate and reinstate sus-

pended employees is conditioned by the Executive Order in the case of reinstatement, on an affirmative finding by the agency head that the employee's retention is "clearly consistent with the interests of the national security," irrespective of the sensitivity of the employee's position. The President's exercise of his power under Section 3 of the Act (5 U. S. C. 22-3) to extend its provisions cannot be viewed in a vacuum without regard to what was extended, for the discretionary standards of a statute enacted to maintain the integrity of "classified information" and "material" have now been transformed into a rigid single standard upon which the job security of each and every federal employee depends.

Indeed, the President has found that the interests of the national security require that all federal employees be "reliable, trustworthy, of good conduct and character," as well as completely loyal (Preamble, Executive Order 10450). He also has found that all employees are to be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies of the entire government. These findings, we think, are wholly at odds with the meaning of the statute as previously discussed (Point I, *supra*), and with any reasonable construction of the President's power under 5 U. S. C. 22-3. For instance, it may be the essence of good government to require a mutually consistent and no less than minimum standard of "reliability," of "trustworthiness," of "good conduct and character," in traits of fish and wildlife employees, of wash room attendants, of food and drug inspectors, but surely it is not required "in the interest of the national security."

The division in the court below (226 F. 2d 337, 340-1), was apparently the result of a misunderstanding of the legislative scheme embodied in the statute. That scheme requires flexible standards for federal employees, depending upon the extent to which the national security interest

permeates the agencies in which they are employed, and the particular positions held by them within those agencies. (See "*The Report on the Security Program*," Appendix "B" *infra*, pp. 64-65). While the President clearly had the right to direct his subordinates to exercise their "discretion" in a manner consistent with the statute, he had no right whatever to deprive them of that discretion by *requiring* the dismissal of each and every employee who did not meet the mandatory Presidential standard. Even if we assume, *arguendo*, that the President had the power to extend the Act of August 26, 1950, to each and every agency of the government, he had no power to extend it to *each and every employee* in each and every agency, under a rigid single standard which precluded the exercise of any discretion on the part of the agency head, irrespective of the degree to which the employee's position affected the national security.[18] The extent to which the statute was to be applied within any particular agency was left specifically by Congress to the discretion of the agency head concerned. This issue does not involve the naked exercise of the Executive power: *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 37 U. S. 524. Rather, it involves that aspect of the Executive power which Congress has the right to reasonably restrict, regulate and direct. *United States* v.

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[18] Cf. Statement of former Senator Harry P. Cain, member of the Subversive Activities Control Board, *"Washington Post,"* January 16, 1955: "This criterion, that an accused applicant or employee must meet the test that his employment is 'clearly consistent with the interest of the (national security)' would and does, where literally applied, constitute a burden which can hardly be borne by anyone. It almost makes the employee affirmatively prove that the national interest requires the retention or continuation of his services. Who among us could do that? * * * 'Clearly consistent' can easily be construed to mean without doubts, real or fancied, of any kind. It can be read to mean that pure hearsay or malicious gossip or unsupported allegations constitute doubts to be resolved in favor of the Government. To my knowledge it has been so read. * * * Any system through which men and women are judged must provide the judges with room for judgment and discretion."

Perkins, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52. In this connection, the President's order was not a valid exercise of the Executive power, but an unauthorized and invalid amendment of the Veterans' Preference and Lloyd-LaFollette Acts.

Indeed, throughout the extensive committee hearings on H. R. 7439, representatives of the Executive Branch assured Congress that the proposed statute would not become a substitute for the loyalty program established by Executive Order 9835, 12 F. R. 1935, and that in "loyalty" dismissals, the employee's right to appeal to the Civil Service Commission would be preserved. The Undersecretary of the Navy stated that while it was "manifestly proper and advisable to provide a review on the question of an individual's loyalty," such was not the case when it came to "security risks", in those agencies directly concerned with the preservation of "classified" information and material. *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, p. 70. In this connection, the precise question was raised and answered in committee hearing:

> "Mr. Miller. * * * If this law is enacted will the Department of Defense use it as a blanket authority and group both loyalty and security risks under this one bill?
>
> "Mr. Larkin. We will not, Mr. Miller.
>
> "Mr. Miller. What assurance is there that you will not?
>
> "Mr. Larkin. Well, let me address myself to your question in this fashion: Under the Act as drafted, the authority granted, I think, clearly can be construed to give the Departments that are named in here the authority to handle both loyalty and security types of cases. It is our representation to the Congress that, if this bill is enacted, we will use the authority given for security cases only; that we will adhere to the present loyalty program of the President as spelled out in the Executive Order and as it

> results in an appellate board for loyalty cases in the form of the Richardson Board. * * * In the event that the President's loyalty program or the Executive order under which it operates is ever rescinded on the ground that the executive department or all executive departments as a whole do not need that continual further loyalty check, then, at such time but not until then would we use this authority for loyalty * * * I am not trying to speculate that it will; I am just pointing out that the authority here is broad enough so that, if it ever does, *the sensitive agencies could rely on the authority here.* That is the representation we are making in support of the bill, and I think you are entitled to rely on that representation." (*Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, March 30, 1950, p. 59.) (Emphasis supplied.)

It is apparent that the President was given authority to extend the statute when necessary in the best interests of security to agencies other than those originally specified (5 U. S. C. 22-3.) Thereafter, the newly-included agency might use the "loyalty program" and the "security program" concurrently,[19] depending upon the "sensitivity" of the particular position within its ordinarily "non-sensitive" operations. The "sensitive" agencies, however, were permitted to treat "disloyalty" cases and "security risk" cases as one only in the event the loyalty program was rescinded ("on the ground that the executive department or all executive departments as a whole do not need that continual further loyalty check"). *Hearings, supra,* at p. 59. All that the President was authorized to do under Section 3 of the Act (5 U. S. C. 22-3) was either: to discontinue the loyalty program (Executive Order

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[19] See *e.g., Loyalty-Security Regulations,* Department of State, effective March 16, 1951, Sections 391.1, 396.42, 396.43; *Security Regulations,* Department of Defense, effective January 19, 1951, Sections 2(b), 3(a), quoted in Bontecou, *"The Federal Loyalty-Security Program"* (New York, 1953), pp. 323-335, 349. *"The Report on the Security Program,"* Appendix "B," *infra,* p. 66.

9835), at which time the "sensitive" agencies could treat loyalty and security cases as one; or to extend the Act to other agencies of the Government when deemed necessary in the best interests of national security, keeping the Government-wide loyalty program in effect. Thereupon, the various agency heads could have used both programs concurrently, "security" to supplement "loyalty," whenever necessary to protect the integrity of "classified" information or the "security" of a particular activity. What the President could not do, but what he did when Executive Order 10450 was promulgated (April 27, 1953, 18 F. R. 2489), was to extend the Act to *each and every employee* in each and every agency under a program based upon a single minimum standard—"clearly consistent with the interests of national security"—in substitution for a government-wide loyalty program. Congress expressly stated its intention to be otherwise. "[I]t is impossible to treat security risks and disloyal employees in the same manner." *H. Rep. No. 2330,* 81st Cong., 2nd Sess., p. 4 (1950); *S. Rep. No. 2158,* 81st Cong., 2nd Sess., p. 2 (1950). The Congressional recognition of this "impossibility" was based on its clear understanding that the problem of "loyalty" was government-wide, whereas the problem of "security" was restricted to "sensitive" areas of the government relating to the nation's security (Point I, *supra*).

That the mandatory requirements of Executive Order 10450 deprived the agency head of statutory discretion is clear from the conceded facts. Petitioner was a Food and Drug Inspector. His job consisted in inspecting for health, labelling and other regulatory purposes, the various foods, drugs and cosmetics subject to federal regulation under Title 21, United States Code. (See particularly 21 U. S. C. 374.) Inasmuch as respondents conceded that petitioner had no access to any government secrets or "classified material" and was not in a position to influence policy against the interests of the United States (R. 40), and

inasmuch as respondents asserted below that petitioner was not charged with "disloyalty," the termination of petitioner's employment as "necessary or advisable in the interest of the national security" was patently arbitrary.

The charges against petitioner concerned his personal associations, allegedly with members of the Communist Party, and his relations with an organization called the Nature Friends of America (Pet.'s Ex. 3, R. 16-18). After his dismissal, petitioner specifically offered to prove his innocence in these respects, *viz.*, that he had not knowingly maintained a sympathetic association with any Communist Party members, and that his nexus with the Nature Friends of America was of the most casual sort and had to do only with its activities for nature lovers (Pet.'s Ex. 10, R. 27). Although the Secretary apparently took these facts into consideration at the time of his dismissal (Pet.'s Ex. 13, R. 32), there was a refusal to reopen petitioner's case or rescind the order dismissing him.

The District Court held the dismissal valid, stating that "conceivably it is within the realm of possible contemplation" that a Food and Drug Inspector might impair the public health (125 F. Supp. 284, 288). How, the court did not state. This suggestion was as irrelevant as it was bizarre. Petitioner was not charged with being a saboteur, and as such he could have been no more dangerous than a private citizen employed in a food packing plant. See Yarmolinsky, "*Case Studies In Personnel Security*" (B. N. A., 1955), Case No. 136, pp. 170-172. The only way petitioner could have impaired the public health was if he intentionally contaminated food he was required to inspect, or if he intentionally failed to report evidence of contamination. In other words, if petitioner were disloyal, there was an exceedingly remote possibility that he might sabotage the food supply during a time of national emergency. But respondents conceded in the court below that petitioner was not charged with disloyalty.

It is well settled that where Congress has specified the grounds for removing federal employees and prescribed certain procedures, the judiciary will determine whether the mandate of Congress has been complied with (*United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Wickersham*, 201 U. S. 390); in the absence of legislative restraint, however, this Court has generally refused to supervise the removal of inferior government employees by executive officials. *Myers* v. *United States*, 272 U. S. 52.

The mandate of Congress under which petitioner was fired provided that an employee may be discharged whenever the agency head:

> "* * * shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned *shall be conclusive and final.*" (Emphasis supplied.)

The emphasized portion of the quoted statute is worded almost exactly as the statute involved in *United States* v. *Williams*, 278 U. S. 255, which concerned adjusted compensation for veterans. That statute provided: "The decisions of the Secretary of War, the Secretary of the Navy, and the Director, on all matters within their respective jurisdictions under the provisions of this Act * * * shall be final and conclusive." In upholding the Administrator's decision, a unanimous Court ruled that the Administrator's decision is final, at least unless it be wholly without evidential support, or wholly dependent upon a question of law, or clearly arbitrary or capricious" (*id.* at pp. 257-258). In *Estep* v. *United States*, 327 U. S. 114, the statute provided that the classifications made by local draft boards "shall be final except where an appeal is authorized in accordance with such rules * * * as the President may prescribe." This Court ruled that the classification could be overturned only if it has "no basis in fact" (*id.* at p.

122). See *Dickinson* v. *United States*, 346 U. S. 389, 396; *Witmer* v. *United States*, 348 U. S. 375, 381.

Thus, while the Act of August 26, 1950, grants finality to the Secretary's determination to discharge or retain employees whenever in his discretion it is "necessary or advisable in the interests of the national security," it does not grant finality to the Secretary's determination that "black is white." Cf. *Dismuke* v. *United States*, 297 U. S. 167, 172. Indeed, in the present context we think it clear that the statute could not validly do so. Cf. *Wieman* v. *Updegraff*, 344 U. S. 183, 192. The pragmatic result was not hard to see. Cole was in a non-sensitive job, but that fact booted nothing for his retention. All along, the discretion of the Secretary, which was supposed to permit a weighing of the charges against him in relation to the sensitivity of his employment, was bound hand and foot by the supererogation of the President. The merest lip service might be paid to the intent of Congress, but the conclusion was foregone. Cf. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260.

The Secretary could not have exercised "discretion" under the statute so as to ignore the mandatory provisions of the Executive Order, although no national security considerations were involved in petitioner's case. And while the Secretary had independent Cabinet rank, we cannot ignore the fact that Cabinet officers are chosen lieutenants of the President committed to the zealous execution of his politics, removable at his will (*Myers* v. *United States*, 272 U. S. 52), and unlikely to defy him, however strong the legal position in support of their doing so may be. See, e.g., *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. Accordingly, there can be no question that in petitioner's case the agency head totally failed to consider the relationship between his job and the national security, for if that relationship was considered, the adverse determination, in the light of the *conceded* facts, was patently arbitrary.

III

Executive Order 10450's standard of employee discharge is inconsistent with the standard of employee discharge established by the Act of August 26, 1950.

Section 1 of the Act of August 26, 1950, establishes the standard to be followed by an agency head in determining whether a particular employee should be retained or terminated. The standard is set forth in the statute as follows:

> "The agency head concerned *may*, * * * terminate the employment of such suspended civilian officer or employee whenever he shall determine *such termination necessary or advisable in the interest of the national security of the United States* * * *." (Emphasis supplied.)

The Executive Order, on the other hand, establishes a different standard for retention or termination, namely, that unless retention is established affirmatively to be "clearly consistent with the interests of the national security," the employee *must* be terminated. (See Executive Order 10450, Sections 2, 4, 5, 6 and 7.)

As has already been stated, the power granted to the President by the Act of August 26, 1950, Section 3, was limited to an extension of Section 1 to departments and agencies not initially made subject to the Act. It is clear that the President had no authority to revise the statutory standard to be used by agency heads in arriving at a particular determination, for, even if it be conceded that the President could extend the provisions of the Act of August 26, 1950, to every department and agency of the Federal Government, it is obvious that he could not prescribe standards thereunder more onerous than those established by Congress. *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 616, 618; *Miller* v. *United States*, 294 U. S. 435, 440.

Prior to the issuance of Executive Order 10450, the standard for employee termination under the Act of August 26, 1950, was administratively interpreted by various security regulations issued pursuant to the authority of the statute. For example, Section 393.1 of the *Loyalty-Security Regulations* of the Department of State, effective March 16, 1951, provided:

> "393.1 *Security Standard.* The standard for removal from employment in the Department of State under Public Law 733, 81st Congress, shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of the national security." (Quoted in Bontecou, "*The Federal Loyalty-Security Program*," *supra*, at pp. 325-326.)[20]

However, under the "clearly consistent" standard established by the Executive Order, all doubts are now required

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[20] See also: *Security Regulations, Department of Defense, Section 4(a)*, effective January 19, 1951 (quoted in Bontecou, *supra*, p. 349); *Loyalty-Security Regulations, for Army Civilian Personnel*, Section 7(a), (SR 620-220-1, Par. 7a, effective November 13, 1950).

[21] Compare the standard used by perhaps the most "sensitive" agency—the Atomic Energy Commission—which is specifically excluded from the Act of August 26, 1950 (5 U. S. C. 22-2):

> "The decision as to security clearance is an overall, commonsense judgment, made after consideration of all the relevant information as to whether or not there is risk that the granting of security clearance would endanger the common defense or security. If it is determined that the common defense or security will not be endangered, security clearance will be granted; otherwise, security clearance will be denied." *Hearings, Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong., 1st Sess., March 10, 1955, p. 286; Biddle, "*Subversives in Government*," ANNALS, American Academy of Political and Social Science, 1955, Vol. 300, at p. 59.

to be resolved in favor of the government.[21] John Lord O'Brian put it thus:

> "In fact, if there is any presumption recognized in this field, it would seem to be a presumption of guilt. As I have said, the present Executive Order requires an affirmative finding that employment shall be clearly consistent with national security. And this qualification is generally interpreted to mean that every doubt must be resolved in favor of the government." (O'Brian, "*National Security and Individual Freedom*" (Cambridge, 1955), p. 64.)[22]

When the agency head applied Executive Order 10450 to petitioner, which the Executive Order required, and found that it required his dismissal, a more onerous standard of judgment ("clearly consistent with the interests of the national security") was used than that provided by the Act of August 26, 1950 ("necessary or advisable in the interest of the national security"). Indeed, the agency head never made a determination that petitioner's dismissal was "necessary or advisable in the interest of the national security of the United States," the standard established by Congress (Pet.'s Ex. 6, R. 21). Previously, the Court below had noted that such a change of standard can be decisive of an employee's loyalty or security status. See *Jason* v. *Summerfield* (C. A. D. C.), 214 F. 2d 273, 276, cert. den., 348 U. S. 840.

Chief Judge Edgerton's dissent below makes it clear that the standard of Executive Order 10450 "differs vitally from the 'necessary or advisable' test that Congress prescribed."

> "The difference is closely parallel to that between the test, 'reasonable grounds exist for belief that the

[22] See also: M. S. Livingston, "*Science and Security*," ANNALS, American Academy of Political and Social Science, 1955, Vol. 300, p. 7; Bagdikian, "*What Price Security?*" Providence Journal-Bulletin, March-April, 1955, at p. 5; Cain, op. cit., *supra*, note 18.

> person involved is disloyal;' used in Executive Order 9835; and the test, 'There is a reasonable doubt as to the loyalty of the person involved,' used in the later Executive Order 10241. As this court has held, that 'amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person "is disloyal" does cause a reasonable doubt as to whether he is in fact loyal' * * *. Just so here, the amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is 'necessary or advisable in the interests of national security,' does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be, he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-LaFollette Act and the Veterans' Preference Act." (226 F. 2d 337, 342-3).

Accordingly, the Executive Order, insofar as it purports to deprive petitioner of the protections of the Veterans' Preference and Lloyd-LaFollette Acts, is void. The President had no power under Section 3 of the Act (5 U. S. C. 22-3) to create a more onerous burden on the suspended employee than the one provided by statute. See, e.g., *Manhattan General Electric Co.* v. *C. I. R.*, 297 U. S. 129, 134; *International Railway Co.* v. *Davidson*, 257 U. S. 506; *Waite* v. *Macy*, 246 U. S. 606, 609; *Morrill* v. *Jones*, 106 U. S. 466.

IV

The notice of dismissal was not "a written statement of the decision" of the agency head.

The decision of the agency head on January 15, 1954, terminating petitioner's employment effective January 20, 1954, as "not clearly consistent with the interests of national security" (Pet.'s Ex. 6, R. 21) [23] failed to set forth any of the reasons for the determination except to refer to the letter of charges (Pet.'s Ex. 3, R. 16-18) and petitioner's letter of December 23, 1953, wherein he refused to make any explanation of his associations and stated that he would continue to associate with whom he pleased (Pet.'s Ex. 4, R. 19). The action of the agency head on January 15, 1954, was thus in direct violation of the Act of August 26, 1950's requirement that the employee receive "a written statement of the decision of the agency head". Cf. *Mulligan* v. *Andrews* (C. A. D. C.), 211 F. 2d 28; *Deak* v. *Pace* (C. A. D. C.), 185 F. 2d 997.

The Act of August 26, 1950, permits summary dismissal when, in the discretion of the agency head, such action is "necessary or advisable in the interest of the national security". It does not permit summary dismissal when the agency head reasons that every "Republican, Jew or Negro" is a "poor security risk," *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100. Yet, without "findings" this Court would find it difficult to review such a dismissal. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong," *United States* v. *Chicago, M. St. P. & R. RR.*, 294 U. S. 499, 511.

[23] The dismissal notice did not use the statutory standard—"necessary or advisable in the interest of the national security" (5 U. S. C. 22-1). It used the formulary phrase of Executive Order 10450, "clearly consistent with the interests of national security" (Pet.'s Ex. 6, R. 21).

Judge Frank's observation, in *United States* v. *Forness* (2 Cir.) 125 F. 2d 928, 942, that "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper," is particularly appropriate in "security risk" cases. As one observer put it:

> "One other safeguard against arbitrary action is lacking in present security processes—a statement of reasons for each decision. As one lawyer put it to an agency head: 'Try getting your reasons for dismissing this man down on paper. I think you will be so ashamed of them you will change your mind' ". (Lewis, "*Our Security Program Need Not Be Unfair,*" *The Reporter,* November 4, 1954, at p. 22.)

The statutory requirement of a "written statement of the decision of the agency head" was calculated by Congress as insurance that the actual decision be made by the agency head and that the purposes of the statute not be misused under the cloak of national security. *S. Rep. No. 2158,* 81st Cong., 2nd Sess., p. 3 (1950). Indeed, the requirement of personal review by the agency head was the principal reason for Congressional willingness to forego an independent review procedure for dismissals under the Act. (*Hearings, House Committee on Post Office and Civil Service, on H. R. 7439,* 81st Cong., 2nd Sess., March 30, 1950, pp. 61-63, 69, 89, 91-96; see also: 96 C. R., pp. 10019-10020, statement of Congressman Rees.) Thus, it cannot seriously be contended that the more recitation of the Executive Order's formulary phrase satisfies the requirements of the statute. Even the minimum safeguard provided by the fact that people usually read what they sign is then an empty one; a rubber stamp would do as well.

The need for a statement for the grounds of the decision to terminate an employee under the statute is evident here. There were five charges against petitioner. Whether or not he availed himself of the hearing to which he was entitled by law, the agency head was required, in arriving at a

decision, to consider these charges in relation to the nature of the job held by petitioner and he was entitled to know which of the charges proved fatal to him. Of course, he was also entitled to the assurance that his dismissal was in fact based on those charges. Further, the observance of this procedure was perhaps decisive to petitioner's chances for reinstatement in another position. Neither the statute nor the Executive Order foreclosed him from seeking clearance for another position felt to be "less sensitive," but the failure to give him the reasons for his dismissal made such an attempt immeasurably harder.

This Court has repeatedly ruled that where Congress has prescribed conditions for the exercise of administrative action, the "decision" of the administrative body must set forth the "reasons" for that action. See, e.g., *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654; *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-95; *Florida* v. *United States*, 282 U. S. 194. In judicial parlance, "decision" sometimes means not only the result, but the reasons for that result. *Lambros* v. *Young* (C. A. D. C.) 145 F. 2d 341, 343, ftn. 2. In administrative parlance, as Congress uses that term, "decision" means the "reasons," or the basis for the administrative result, as well as the result itself. *Administrative Procedure Act*, Section 8(b), 60 Stat. 242, 5 U. S. C. 1007(b); *Attorney General's Manual on the Administrative Procedure Act* (1947) pp. 86-87.

It has been said, and not without justification, that the requirement of administrative findings is "to assure against Star Chamber methods," *Saginaw Broadcasting Company* v. *Federal Communications Commission* (C. A. D. C.), 96 F. 2d 554, 559, cert. den., 305 U. S. 613. In the present context that statement is fitting, for, as the dissent below observed: "Unless reasons are given, no safeguard [against arbitrary action] is provided." (226 F. 2d 337, 343.) Clearly, the statutory procedure demanded that the Secretary set out with reasonable specificity the reasons for

dismissing petitioner. Otherwise, it was meaningless. This minimum statement was wanted if only to insure that the grounds for dismissal were contained within the original charges. Without such assurance, the other procedural requirements of the statute are next to worthless, for the employee may tilt with a straw man while the real menace stands behind him unseen.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed with directions to require the granting of judgment on the pleadings in favor of petitioner, together with such other relief as may be appropriate.

Respectfully submitted,

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APPENDIX "A"

Act of August 26, 1950, c. 803, 64 Stat. 476, 5 U. S. C. Sections 22-1, *et seq.*, Public Law 733, 81st Cong. 2nd Sess.

5 U. S. C. SECTION 22-1: (PUBLIC LAW 733, SECTION 1)

Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency

head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22-1 to 22-3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further*, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further*, That the head of any department or agency considering the appointment of any

person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

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5 U. S. C. Section 22-3: (Public Law 733, Section 3)

The provisions of sections 22-1 to 22-3 of this title shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

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Act of June 27, 1944, c. 287, Section 14, 58 Stat. Section 14 of the Veterans' Preference Act, 5 U. S. C., Section 863.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons,

specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .

* * * *

Act of August 24, 1912, c. 389, Section 6, 37 Stat. 555, as amended June 10, 1948, c. 447, 62 Stat. 354, Section 6(a) of the Lloyd-LaFollette Act, 5 U. S. C., Section 652(a).

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on

such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reason for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission . . .

* * *

Executive Order No. 10450

Apr. 27, 1953, 18 F. R. 2489, as amended by Executive Order No. 10491, Oct. 15, 1953, 18 F. R. 6583.

Security Requirements for Government Employees

Whereas the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

Whereas the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privilege to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

Appendix "A"

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SEC. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * * *

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the reten-

tion in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the

interests of the national security which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another

government in preference to the interest of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

• • •

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

• • •

APPENDIX "B"

A REPORT

BY THE

INTERDEPARTMENTAL COMMITTEE ON INTERNAL SECURITY

ON

THE GOVERNMENT EMPLOYEE SECURITY PROGRAM

AS SUBMITTED TO

THE PRESIDENT

BY THE

NATIONAL SECURITY COUNCIL

(April 29, 1952, White House Mimeograph Release No. 3326, August 8, 1952)

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* * *

IV. CONCLUSIONS

1. *An employee security program must be limited to the legitimate interest of national security.* Section 6 of the Act of August 24, 1912 (Lloyd-LaFollette Act) provides for the suspension and removal of employees from the classified service "for such cause as will promote the efficiency of such service." Historically, the rules and regulations of the Civil Service Commission have provided that appointment in the competitive service may be denied to applicants for a number of reasons. These reasons, which are generally referred to as relating to "suitability," are listed in section 2.104 of the Commission's regulations. They include the standard which is prescribed in Executive Order 9835 to govern denial of or removal from employment on the grounds of loyalty. The same grounds which justify denial of appointment in the competitive civil service will also justify removal of an employee from that service.

It may be seen, therefore, that even in the absence of an employee security program or security legislation, a person may be denied employment, or removed from employment, in the Federal civil service for a number of reasons. This has led many persons to question the need for a formal "security" program, superimposed on the existing programs relating to loyalty and suitability. It is the opinion of the Committee that an employee security program is justified, *within limits,* in order to afford the fullest possible protection to the national security. A program such as may be established under Public Law 733, affords the necessary authority to agency heads for getting questionable employees quickly out of sensitive positions when other remedies are not available. It also permits appropriate action to be taken to protect the Government against persons who may knowingly or unknowingly endanger the national security even though there may not be "reasonable doubt" as to their loyalty.

An employee security program, as in the case of the Employee Loyalty Program, is a special program which can be justified in these times. As such, it must be applied only to the extent required "in the interest of national security." Further, it is not required as, nor should it become, a substitute for the programs which have been established to handle cases of applicants or employees of doubtful loyalty or doubtful suitability.

Not all departments and agencies of the Government will have need of an employee security program since the national security, in the sense contemplated, will not be involved in their operations. Public Law 733 provides authority to suspend and remove employees "in the interest of the national security." This authority is limited to those departments and agencies named therein, and to such other departments and agencies as may be designated by the President "in the best interests of national security." Obviously, it was the intention of the Congress to limit the

application of that authority to those departments and agencies whose employees, in the performance of their duties, might be in position to endanger or compromise the national security. The term "national security" is not defined in the law. It is clear, however, that the term does not relate to *all* functions and activities of the Federal Government; if so, the law would have been applicable to all departments and agencies. In a general sense, it appears that "national security" as used in Public Law 733 relates to the ability of the country to protect and defend itself against hostile or destructive action, overt or covert, including enemy military action. . . . Any act, or failure to act, which would have the effect of weakening or compromising this ability can be said to endanger the national security. Any department or agency whose functions are such that acts, or failures to act, on the part of employees would have this effect will have need of an employee security program.

On the other hand, acts or failures to act which would have no direct bearing upon the ability of the country to protect and defend itself against hostile or destructive action, cannot be said to endanger the national security. This is true even though such act, or failure to act, may be a breach of confidence or trust; may cause embarrassment to a department or agency of the Government, or to a Government official or officials, or to private citizens; may cause financial loss to the Government or unjust enrichment of a person or persons; or may endanger a non-security program of the Government. Thus, many departments and agencies are responsible for functions which, while they are intimately connected with the welfare and happiness of the people of this country, are not directly related to the national security as that term is used in connection with an employee security program.

Furthermore, even in those departments and agencies which have need of an employee security program, not *all* positions in the department or agency will necessarily be

concerned with the "national security," and therefore not all employees will be in a position to compromise or endanger the national security. The program must be applicable only with respect to those positions, which may be designated as "sensitive positions," whose incumbents might be in position to endanger the national security.

These facts will serve to limit an employee security program to: (1) Those departments or agencies, or parts thereof, whose functions are concerned with the "national security"; (2) Those positions which may be designated as "sensitive"; and (3) Those adverse actions against employees in or applicants for sensitive positions which cannot appropriately be taken either under the loyalty program or for reasons of general suitability under civil service rules and regulations (pp. 13-16).

* * * * *

V. Recommendations

1. In the interest of promoting uniformity in determining the need for and the extent of employee security programs in the various departments and agencies there should be definitions of the key terms "national security" and "sensitive position." For this purpose the following definitions are recommended:

> The term *national security* as used herein relates to the safeguarding of the United States against any attempt to destroy or weaken it by force or violence, subversion, or any other means. Within the area required to be safeguarded are military, foreign relations, and related matters of the Government, the disclosure or compromise of which would aid our enemies or would endanger our defense. As used herein the term national security does not include questions of policy or judgment with respect to other Government matters relating to the general welfare, health and happiness of our people in their economic

and political life, not requiring security classification. *Sensitive position* means (1) Any position the duties or responsibilities of which require that the incumbent have access to security information or material, classified "Confidential", "Secret" or "Top Secret"; and (2) Any position which exists in an organizational entity where, because of the nature of the work being done, the very presence of the incumbent would make it possible for him to obtain possession of security information or material, classified "Confidential", "Secret" or "Top Secret", or to commit acts which would directly endanger the national security.

2. The head of each department and agency of the Federal Government should be responsible for identifying the sensitive positions, if any, in his department or agency, using the uniform definition of "sensitive position."

3. Based upon his review and identification of sensitive positions, the head of each department and agency to which Public Law 733, 81st Congress, is not already applicable should decide whether, in his opinion, there is need for an employee security program in his department or agency. If he decides after consultation with ICIS that such program is necessary, he should request issuance of Executive Order authority through normal channels for extension of the provisions of Public Law 733 to his department or agency.

4. Employee security programs should not be construed to replace, change or otherwise modify the Federal Employee Loyalty Program or the laws, and the rules and regulations of the Civil Service Commission, relating to suitability for employment in the competitive civil service. In any individual case the program most properly applicable should be utilized for its disposition (pp. 27-28).

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Supreme Court of the United States

October Term, 1955

No. 442

KENDRICK M. COLE,

Petitioner,

v

PHILIP YOUNG, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

Introductory Statement

Respondents' Brief proceeds in large measure on an avoidance of the vital issue before this Court. That issue is whether a concededly loyal employee, holding a non-sensitive, non-policy-making position in the Department of Health, Education and Welfare, can be summarily suspended and dismissed from federal employment pursuant to a statute which authorizes summary suspension and dismissal of federal employees "when necessary or advisable in the interests of the national security."

Whether the President had the power to extend Public Law 733 to the Department of Health, Education and Welfare (Res. Br. 20-42) and whether Congress ratified the extension (Res. Br. 57-65) are not issues which are involved

in this case. The first and basic question before this Court, assuming the power of the President to extend Public Law 733 to the Department of Health, Education and Welfare, is whether the Secretary of that Department could dismiss petitioner under the terms of the statute, in view of the conceded facts.

Secondly, this Court is asked to determine whether Executive Order 10450, as applied to petitioner, invalidly cut off his rights under Section 14 of the Veterans' Preference Act because in conflict with the base statute—Public Law 733. But that is a separate question which we do not reach unless the Secretary's action was otherwise valid under the statute.

The third question is whether petitioner's notice of termination was a "written statement of the decision of the agency head" as required by Public Law 733. These are the basic issues of this case and the ones to which this Reply Brief is directed.[1]

I

The decision to discharge petitioner pursuant to the Act of August 26, 1950, could not be justified in the interest of national security as required by that Act and was therefore invalid.

In his prior brief, petitioner contended that on the conceded facts the Secretary of Health, Education and Welfare did not validly dismiss him "in the interests of national security," *i.e.*, pursuant to the Act of August 26,

[1] The question, raised on February 9, 1956, for the first time in this litigation, that petitioner's appeal to the Civil Service Commission was not timely (Res. Supp. Mem.) has been withdrawn, and will not be considered in this reply brief.

1950.[2] That is the initial question for decision by this Court, and, while respondents do not include it in their counter statement of "Questions Presented,"[3] they devote a major portion of their brief to answering it.[4] Nonetheless, they fail to meet the elemental proposition that action allegedly taken in the interest of national security must find some rational justification in that interest, and since in petitioner's case there was none, the Secretary's action in dismissing him under the 1950 Act was invalid.

We emphasize at the outset that it was the Secretary's action, for respondents irrelevantly answer that the courts cannot review her decision without encroaching on the President's constitutional discretion in political and foreign affairs (Res. Br. 22-23). Of course, that is not the case, for petitioner was an "inferior officer" within the meaning of Article 2, Section 2, Clause 2 of the Constitution, and just as Congress could vest his appointment in the Secretary of Health, Education and Welfare, it could, as it did in P. L. 733, limit the conditions of his removal

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[2] Referred to as "P. L. 733" by respondents and similarly in this reply brief.

[3] Res. Br. 2-3. Elsewhere they say that the ultimate question is whether P. L. 733 and Executive Order 10450 take away the right of appeal to the Civil Service Commission granted by Section 14 of the Veterans' Preference Act, 58 Stat. 387, as amended, 5 U. S. C. 863 (Res. Br. 15). Of course, they do take away that right, as the quickest reading of P. L. 733 makes clear. The true question, however, is the applicability of that statute to petitioner. The administrative appeal, as petitioner pointed out before (Pet. Br. 13-14), is only one of the vital procedural rights cut off by that Act if it applied to him.

[4] In widely separated portions of their brief they discuss this question in two phases: the scope of the authority vested in the Executive by the 1950 Act (Res. Br. 20-42), and whether the Secretary validly dismissed petitioner pursuant to that authority (*id.*, 62-65). But we think the question is put in clearer focus if these two phases of it are discussed together.

by her, without regard to the President. *United States* v. *Perkins*, 116 U. S. 483; *Eberlein* v. *United States*, 257 U. S. 82. But that question really is not involved here, for it is the Secretary in whom Congress vested the authority; it is she who dismissed petitioner, and it is her decision to do so, and the subsequent refusal of jurisdiction by the Civil Service Commission to hear his appeal, which petitioner complains of here.[5]

Respondents concede (Res. Br. 63) that "arbitrary or capricious action" by the Secretary "plainly unconnected with the good or efficiency of the federal service" under the Lloyd-LaFollette and Veterans' Preference Acts is subject to judicial redress. Therefore, we do not understand them seriously to suggest that her actions under the instant statute are any less subject to review where they are plainly unconnected with national security.[6] Such a result would discriminate reasonlessly against the public servant fired for one reason instead of the other. Moreover, it would open the door to wholesale evasion of the Lloyd-LaFollette and Veterans' Preference Acts themselves, for any arbitrary decision taken "notwithstanding" those statutes (see P. L. 733, Section 1) would stand beyond correction if only the word "security" were used. Petitioner contends his was such a case. But this Court

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[5] Petitioner also contends, of course, that Executive Order 10450 was invalid because of its substitution of a different and more onerous rule of employee termination than the Congressional one. The result was to subject petitioner and all other federal employees to a rigid new standard. But the effect of the Order is a separate question. *Initially*, the Order may be viewed as no more than a valid exercise of the President's power under Section 3 of the Act, a vehicle for extending the statute's substantive provisions to the Department of Health, Education and Welfare in addition to the other departments and agencies originally named in Section 1.

[6] Respondents make the point in passing (Res. Br. 21-22), but in view of their later concession, it seems purely a formal one.

turned its back on that alternative in *Wieman v. Updegraff*, 344 U. S. 183.[7]

However, the very idea of judicial review in such cases is one which makes no distinction as to the alleged cause for dismissal where arbitrariness is shown. Limited as such review is, it presupposes that Congress, in legislating for the civil service, did not do a vain thing, and that its enactments cannot be disregarded at the whim of the Executive. We have stated that the area of executive judgment under the Act of August 26, 1950, is large; yet it is not absolute, any more than in prior enactments. The limitation that such judgment cannot be arbitrary or capricious implies some objective standard to guide it, if only in the minimal sense of setting outer limits for its exercise. We contend that this was a case beyond those limits.

One aid to determining this standard is the specific problem which Congress sought to deal with in the 1950 Act. Therefore, petitioner referred to the history of the statute. Another aid is the common, contemporaneous understanding of the words used by Congress. See Holmes, *"Collected Legal Papers"* (1920), pp. 203-209. Therefore, petitioner adverted to prior judicial constructions of similar language and to executive interpretations of the statute itself. He did not claim talismanic potence for any of these authorities; however, to reject them all and suggest no alternative standard, as respondents do, is to propose anarchy without limits and, as we suggested (Pet. Br. 30-33), to invite grave constitutional difficulties. The statutory authority is not as "big as all outdoors"—it arises from a specific interest, "national security"—and it is no

[7] Respondents notwithstanding (Res. Br. 65), an employee removed from federal service as a "security risk" does wear the "badge of infamy." Insofar as the public is concerned, the term "security risk" is synonymous with "traitor." See, *e.g., Hearings, Senate Subcommittee, Committee on Post Office and Civil Service, pursuant to S. Res. 70*, 84th Cong., 1st Sess., June 2, 9, 23, August 30, 31, 1955, at pp. 67, 121-122, 130, 271, 550, 573, 599, 627.

answer, therefore, to reject every attempt to give it reasonable definition.

It would not advance matters, either, to bicker endlessly over the legislative history. Briefly, then, we repeat that

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[8] Nevertheless, respondents' assertion (Res. Br. 24-26) that a restrictive view of the bill was not shared by all members of Congress, or that some members of the Senate Armed Services Committee thought the bill applicable to all Government employment, is irrelevant. Cf. *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 463, ftn. 8; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The Senate and House Committee Reports, the Senate and House Committee Hearings, and the House Debates, when read in context, are cogent proof that P. L. 733 was never intended to cover petitioner. See: *S. Rep. No. 2158*, 81st Cong., 2nd Sess. (1950); *H. Rep. No. 2330*, 81st Cong., 2nd Sess. (1950); *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, March 7, 23, 30, 1950, *throughout*; *Hearings, Senate Committee on Armed Services on H. R. 7439*, July 20, 21, 1950, *throughout*; Statement of Congressman Murray, Chairman of the House Committee on Post Office and Civil Service, introducing and explaining H. R. 7439, *96 Cong. Rec.*, 10016-10017. After Congressman Holifield (who, together with Congressman Miller, offered amendments) predicted what would happen if an independent agency review proposal was defeated (Res. Br. 29-30), Congressman Kilday, in opposition to the Holifield and Miller amendments, stated: "* * * what I am trying to make clear is that when you relieve a man on the ground that he is a poor security risk if involves only the very critical functions of government, the very delicate things involved in our Government * * *" *96 Cong. Rec.* 10026. Subsequently, Congressman Murray explained his opposition to the Miller and Holifield amendments as follows: "This is not an employee bill. This is a bill in the interest of national security and the preservation of our defense. * * * The ultimate responsibility for defense agencies and their decision with reference to a bad security risk should not be subject to the review by a non-sensitive board like the Civil Service Commission." *96 Cong. Rec.* 10029. Thereupon, the amendments providing for independent agency review were defeated: *96 Cong. Rec.* 10029. It is the testimony of the legal draftsman, the testimony of the legislative proponents, and the views of Congressman Murray, who introduced and explained the measure in Congress, *96 Cong. Rec.* 10016-10017, 10029, not the expressions of those whose views were rejected, that is controlling as to legislative intent. *Schwegeman Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394-395.

Congress' concern was with security, that it sensibly realized that, in every case, security is necessarily related to the specific nature of the job held by the employee as well as to his personal conduct and character. Since the specific job was an indispensable element of the equation, the Act did not deal with disloyalty as such. "Disloyal persons in sensitive jobs were security risks as well, but "[d]isloyal persons should not be permitted to be employed in the Federal service under any circumstances." *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 2 (1950).[9] Congress did not attempt to define forever the agencies or jobs coming under the Act; manifestly, it could not do so and, pragmatically, neither could the President. But its failure to make such a catalogue is not persuasive in the face of its manifest recognition to the contrary—that every job was not security-involved. Thus, it provided for reemployment of persons fired in other agencies; it even provided for restoration to the former job if the agency head so decided, *i.e.*, if on reevaluation he considered the job not truly sensitive. Elsewhere, it indicated not only the type of conduct which should be grounds for dismissal, but the kind of work which Congress was concerned with—work involving classified data, the formulation of policy or a particular leverage to do harm to the nation. It would serve no purpose to list all the examples given by members of Congress during the hearings on P. L. 733; it is sufficient to say that none of them remotely resembled the routine job of inspecting

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[9] In other words, such persons, regardless of their positions, may be dismissed for the efficiency of the service. Although that question is not in this case, since petitioner is not accused of disloyalty, we note that formerly loyalty suspects were processed under Executive Order 9835 (12 F. R. 1935), as amended (Executive Order 10241, 16 F. R. 3690), which was issued pursuant to the Lloyd-LaFollette and Veterans' Preference Acts. Even with the revocation of Executive Order 9835, such cases could still be processed under those statutes and the regulations issued for their effectuation. 5 *CFR* §§ 2.104(a)(7), 5.4.

sample lots of foods and drugs for purity and conformity to represented standards. Beyond such common knowledge of the kind of work that petitioner did, we have respondents' admissions that he was not a policy-maker nor one who had access to classified data or government secrets.

Similarly, we do not see how it aids resolution of the question here to show that consonant lay and executive interpretations of the Act were ignored by the President in issuing Executive Order 10450. Of course, they were; and no one would deny that the Order evidences one view of P. L. 733. But the Order itself is attacked here for the very reason that it rejects all limitations. To say that it is the final arbiter of what Congress meant is an act of self-levitation. Moreover, it suffers from the same weakness as respondents' brief: while on the one hand it implicitly accepts the abstract idea of limits to the statutory power, it effectively does away with them in practice. The views cited by petitioner were those of thoughtful and informed persons; they recognized, as the statute reveals on its face, that Congress did not intend to rework the whole civil service system in the name of "security" and they therefore understood it as having imparted authority only within rational limits. Since respondents do not deal with the judicial authorities cited by petitioner, we merely repeat that they too represent considered and intelligent views on similar standards used elsewhere.

Finally, then, respondents' dilemma is squarely posed on pages 62 and 63 of their brief. While protesting that the Secretary's authority under the Act was unlimited in the sense of not being subject to judicial review, they nonetheless concede that if her exercise of that authority was arbitrary or capricious in any particular case, it could be nullified by the courts. But, they say, this is not such a case and, thus, the question is finally and squarely posed.

Respondents suggest hypothetically how, though loyal and not in a policy-making or otherwise sensitive posi-

tion, petitioner, a Food and Drug Inspector, might have been a security risk because of close association with reported Communists: he might have transmitted information which should not be known by Communists "even though unclassified"; he might unwittingly have become "a dupe or a pawn" of subversives; the "seeds of disloyalty" might have been sown in him (Res. Br. 64-65). By the same token, F. B. I. Operative Herbert Philbrick, who has worked "under-cover" in the Communist Party, could not be employed as a washroom attendant in a Branch Post Office. And Charles Bohlen, our Ambassador to Russia, could not be retained as a Claims Examiner in the Veterans Administration. While it might be an error of misplaced concreteness to suggest more fully the fallacy of respondents' examples, we believe that they should be met, not only in petitioner's interest, but also in the interests of democratic government.

The problem of security is real, and we do not minimize the Government's difficulty in handling it. But the problem of balancing the demands of "security" and the rights of the "individual citizen" has always plagued all branches of Government. Cf. *Duncan* v. *Kahanamoku*, 327 U. S. 304. Respondents' hypotheticals enunciate the concept of "total security," and thus reject the very essence of "the national security of the *United States*," embracing instead the "security" concept of some totalitarian nation. Cf. Laswell, "*National Security and Individual Freedom*" (1950), pp. 23-75. Former Senator Cain put it in these words: "We must * * * tailor security to the job. An individual may be unsuited for the strictness of security demanded by a particularly sensitive assignment. This does not necessarily imply that the individual couldn't fill many other important assignments with credit to himself and the Government. * * * If this were Russia, we wouldn't bother much. * * * Because we live in America, we must be bothered constantly." *Washington Post*, January 16, 1955, p. 7. Thus, the revelation of unclassified

or non-secret information is a simple breach of confidence—not an act detrimental to national security. Cf. *Heine* v. *United States* (2 Cir.), 151 F. 2d 813, cert. den., 328 U. S. 833. Unlike Petrov in the "Australian episode," petitioner had nothing pertaining to security to reveal. If the "seeds of disloyalty" were planted in him, it is remotely conceivable that he might contaminate food he was required to inspect in time of national emergency.[9a] But so could any one of hundreds of thousands of workers employed in industrial plants processing food for national consumption. Cf. *Parker* v. *Lester* (9 Cir.), 227 F. 2d 708, 721. It is because "the national security of the *United States*" weighs "individual rights" in relation to "national safety" that the Interdepartmental Committee on Internal Security said: "Any act, or failure to act, which would have the effect of weakening or compromising [the ability of the country to protect and defend itself against hostile or destructive action, overt or covert, including enemy military action, relates to 'national security' as used in Public Law 733]. * * * On the other hand, acts or failures to act which would have no direct bearing on the ability of the country to protect or defend itself against hostile or destructive action cannot be said to endanger the national security. This is true even though such act, or failure to act, may be a breach of confidence or trust; may cause embarrassment to a department or agency of the Government, or to a Government official or officials, or to private citizens; may cause financial loss to the Government or unjust enrichment of a person or persons; or may endanger a non-security program of the Government. Thus, many departments and agencies are responsible for functions which, while they are intimately connected with the welfare and happiness of the people of this country, are not directly related to the national security as that term is used in

[9a] We repeat, however, that petitioner's disloyalty, putative or actual, is not even suggested. *Pet. Br.* 5.

connection with an employee security program." *Pet. Br.*, Appendix "B", p. 64.

The vice of respondents' hypotheticals characterizes much of their brief: while conceding that "the national security" is an objective standard within limits, they nonetheless argue that it has no limits whatsoever. The courts cannot abdicate their function in construing P. L. 733 merely because the word "security" is asserted in answer to the issues raised by petitioner. The issue is not new—for they are faced with the same problem whenever the Government asserts its evidentiary privilege against the disclosure of military and security secrets. In *United States* v. *Reynolds*, 345 U. S. 1, the late Chief Justice made it clear that the courts must be satisfied from all the evidence that the evidentiary privilege is *validly claimed*. Chief Justice Vinson stated:

> "Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control of the evidence in a case cannot be abdicated to the caprice of executive officers" (*id.*, at pp. 9-10).

With appropriate word changes, we believe these sentences controlling on the issue in question.

We need not consider whether respondents' hypotheticals (Res. Br. 64-65) would have supported termination under the Lloyd-La Follette and Veterans' Preference Acts, for the simple reason that the Secretary did not even propose to act in accordance with those statutes. Had she done so, petitioner would not have been suspended; he would have been entitled to a fuller statement of the charges, given to him prior to suspension, and he would have been entitled to appeal to the Civil Service Commission to show why he should not be dismissed. Indeed, since this should have been, *if at all*, a dismissal for the "efficiency of the service" and not in the interests of national security, he should have been accorded those rights, and because he was denied them, his discharge was invalid.

II

Executive Order 10450 deprived the agency head of her statutory discretion and subjected petitioner to a more onerous standard than provided by P. L. 733, thereby invalidating his discharge.

As we have contended, the agency head acted beyond her statutory authority and, therefore, invalidly terminated petitioner's employment, pursuant to P. L. 733. Nevertheless, it is true that certain provisions of Executive Order 10450 virtually required her to do so, and in these respects the Order conflicts with the statute.

While the President's Order extended the statute to all other departments and agencies, which we assume, *arguendo,* he was empowered to do, it had an additional, twofold effect which went beyond his statutory authority: specifically, it required the department and agency heads to apply certain absolute security criteria to every employee; and it substituted a different and more onerous general standard for retention of all employees than that contained in the statute. These two aspects of the Order may be treated as one, inasmuch as they are integrally related, together drastically limiting, if not preempting, the statutory discretion of the various department and agency heads, including the Secretary of the Department of Health, Education and Welfare, as the instant case shows.

Chief Judge Edgerton noted in his dissent below that Congress intended even the President's power to extend the Act's provisions to new agencies to be exercised selectively, "from time to time," when specific agencies became involved in security work. (226 F. 2d 337, 341-342). "There is * * * not the slightest reason to suppose that Congress intended to authorize the blanketing of all agencies." (*id.*,

226 F. 2d., at p. 342). Such a construction, he pointed out, would lead to an absurd result, for it would render meaningless the statutory provision that employees considered security risks in sensitive work may be reemployed in nonsensitive agencies. (*Ibid.*)[10] Judge Edgerton's reasoning is compelling. When it is turned upon the President's directive which applied the Act not only to every department and agency, but to every one of over two million federal jobs, ranging from arboretum grounds keeper to intelligence agent, it becomes unanswerable.

A. Executive Order 10450 Deprived the Agency Head of Her Statutory Discretion.

If Executive Order 10450 was merely an exercise of the President's power to guide his subordinates in the construction and administration of P. L. 733 (Res. Br. 48-56),

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[10] This was also the view of former Solicitor General Perlman:

"The conclusion that it was impossible to treat disloyal persons and security risks in the same manner was based mainly on the ground that disloyal persons should not be employed anywhere in the Federal service; but that persons found to be security risks, where matters of a confidential or sensitive nature are handled, might be qualified and suitable for employment in a nonsensitive agency.

"It may seem to be curious that final determinations in cases of subversion and disloyalty involved procedures for notice, hearing, and successive appeals, although employees charged with being security risks—and not with disloyalty—might be removed from sensitive agencies without notice and without pay, pending final action.

"On reflection, the reasons seem obvious. As already stated, it was provided in the act of Congress that any official or employee deemed unsuitable as a security risk in sensitive agencies, which were comparatively few in number would, if qualified for employment elsewhere in Government, be eligible for such employment." *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 9, 1955, pp. 111-112.

petitioner could not complain. But that is demonstrably not the case; for the instant situation amply illustrates how the Presidential Order deprived the agency head of the very discretion she was required by P. L. 733 to exercise. Because petitioner, a Food and Drug Inspector and a concededly loyal citizen, constituted no threat whatever to the national security, his dismissal was arbitrary by the test of the statute. Yet it was contemplated, and indeed demanded, by the Executive Order. Petitioner was required to show, without relation to the nature of his work, that his retention was "clearly consistent" with the President's version of "national security," in order to avoid the consequences of a discharge. This "security," as the President's Order stated, required that all employees meet minimum, mutually consistent (*i.e.* inflexible) standards of reliability, trustworthiness, and good conduct and character. To give content to these standards, the President listed certain factors relating to "suitability,"[11] which were to be considered in relation to the sensitivity of the employee's work; but the remaining factors, relating to political conduct, *i.e.*, "subversion,"[12] were required to be considered in every case, for where they occurred they were derogatory in the absolute sense, regardless of the nature of the information (*e.g.*, whether concerning acts of treason or friendship with one of Justice Holmes' "puny anonymities") and regardless of the employment in question (*e.g.*, whether F. B. I. Agent or zoo attendant). Among these "subversive" factors were "* * * sympathetic association * * * with any person who advocated the use of force or violence to overthrow the Government of the United

[11] *Executive Order 10450*, Section 8(a)(1).

[12] *Executive Order 10450*, Sections 8(a)(2) to (7).

States by unconstitutional means," [13] and "affiliation or sympathetic association with any organization listed by the Attorney General." [14]. The charges against petitioner came within these provisions (R. 16-18, 21). In evaluating these charges, the Secretary had no leeway for judgment, for she could not discount them in relation to the job petitioner held.

We think it clear that a concededly loyal employee who associates with Communists; an alcoholic; or a person addicted to narcotics, may present a risk to the national security interest where his position gives him access to classified or secret information, or the opportunity to influence policy. But if the loyal employee occupies a non-sensitive, non-policy-making position in an agency not primarily concerned with national defense or related matters, he is no more a "risk" if he associates with Communists than he is if he uses narcotics. The Executive Order provides that drug addicts and alcoholics holding non-sensitive jobs are not "security risks" [*Executive Order 10450*, Section 8(a)(1)], as distinguished from individuals who associate with Communists (although com-

[13] *Executive Order 10450*, Section 8(a)(3).

[14] Executive Order 10450, Section 8(a)(5). Section III(3) of Executive Order 9835, 12 F. R. 1935 (May 27, 1947) originally authorized the Attorney General to designate organizations of six types in connection with the loyalty program set up by that Order. Although this program was replaced by the more general security program in Executive Order 10450, Section 12 of the latter continued the Attorney General's power to list organizations of these six types and Section 8(a)(5) of Executive Order 10450 describes these organizations in the same terms as Executive Order 9835 previously had. On May 27, 1948 (13 F. R. 6135, 6138), the Attorney General designated Nature Friends of America as "Communist," claiming that this was its 'dominant characteristic' (13 F. R. 6137). However, the organization never had a hearing on the fairness of this designation in the five and one half years between that date and petitioner's termination. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. Moreover, whether or not this was its 'dominant characteristic', petitioner claimed that his connection with the organization was casual, innocent and intermittent (R. 27, 29-31).

pletely loyal themselves). *Executive Order 10450*, Sections 8(a)(2) to (7).[15]

B. Executive Order 10450 Placed a "More Onerous Burden" on Petitioner Than P. L. 733.

(1) Respondents' assertion (Res. Br. 43-44) that petitioner was not terminated under the provisions of Executive Order 10450, Section 7, is erroneous. Once an employee is suspended, the Executive Order requires the agency head to determine whether retention, as an affirmative matter, is "clearly consistent with the interests of the national security," even where the employee fails to avail him-

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[15] The apparent confusion is caused by the use of the criteria relating to "subversion" as a yardstick for determining "loyalty." While it was generally conceded in Congress that "disloyal" employees in non-sensitive jobs were security risks, it was only in connection with sensitive employment that Congress contemplated the removal of a concededly loyal employee as "security risk" on the ground that his personnel file included derogatory information with reference to "subversion." *Pet. Br.* 17-29. On the facts of petitioner's case, the vice of Executive Order 10450 is that it establishes by indefinably broad and absolute criteria a new kind of "risk"—the "non-disloyal subversive." In fact, Executive Order 10450 purported to adopt the criteria of Executive Order 9835 with respect to loyalty. Compare *Executive Order 9835*, Part V, Sections 2(a) to (f), with *Executive Order 10450*, Sections 8(a)(2) to (7). When these criteria were applied to petitioner's non-sensitive job and were found to require his termination, he was discharged, not because he was a "security risk," but because he was this new type of "loyalty risk." But respondents concede that petitioner is loyal! In considering this aspect of the Executive Order, it is important to reiterate that, while P. L. 733 is concerned with security, its legal effect is almost exclusively procedural. For reasons of national security, it permits the summary suspension and unappealable discharge of employees without the normal protections given an employee suspended or removed for "the efficiency of the service" under the Veterans' Preference Act. Thus, the grounds for removal—"efficiency of the service" or "national security"—made a vital difference in the procedures by which petitioner's removal was accomplished. *Cf. Flanagan v. Young* (C. A. D. C.), No. 12288 — F. 2d —, December 22, 1955.

self of a "hearing." If reinstatement is not "clearly consistent," only then is the employee discharged. Bureau of National Affairs, "*Government Security and Loyalty*," pp. 11:32, 11:34, 11:39, 11:43, 11:57. Security Regulations, *Department of Health, Education and Welfare*, Section 5(f)(3), *id.*, at p. 15:565. Indeed, petitioner's "termination notice" shows that he was terminated because the Secretary found that his "continued employment [was] not clearly consistent with the interests of national security" (R. 21). Therefore, Sections 2, 7 and 8(a)(2) to (7) of Executive Order 10450, and not Section 6, are the provisions under which petitioner was discharged, and the provisions of the Executive Order upon which this issue turns.

(2) Respondents notwithstanding (Res. Br. 44), the only place Section 6 of Executive Order 10450 has relevancy is in connection with petitioner's suspension, as distinguished from his termination.[16] Bureau of National Affairs, "*Government Security and Loyalty*," pp. 11:20-21; Justice Department, "*Sample Security Regulations*", Section 5(a). *Id.*, at pp. 15:103-104. The provisions of Section 6 of the Executive Order are adopted in the Security Regulations of the Department of Health, Education and Welfare, Sections 5(a) and (b), which relate to "summary suspension". *Id.*, at p. 15:564. Section 5(c) of the Health, Education and Welfare Regulations, which permits a weighing of the charges in relation to the "sensitivity" of the employment, is applicable only to suspensions under Section 5(b). *Id.*, at p. 15:564. Such was not the case when the agency head made her required

[16] The action of the agency had challenged as invalid in the instant case is petitioner's termination on or about January 15, 1954 (R. 10-11, 12, 21), not his suspension on November 13, 1953. (R. 15).

determination under Sections 2 and 7 of the Order to reinstate or terminate petitioner, for termination could have been accomplished by the agency head only *subsequent* to her finding that petitioner's retention was not "clearly consistent with the interests of the national security." Cf. *S. Rep. No. 2158*, 81st Cong., 2d Sess., p. 3 (1950). Sections 2 and 7 of the Order, as reflected in Section 5(f) of the Security Regulations of the Department of Health, Education and Welfare, precluded the Secretary from considering the non-sensitivity of petitioner's employment when she made her determination to discharge him (R. 21). In making her required determination under Sections 2 and 7 of the Order [Department of Health, Education and Welfare, *Security Regulations*, Section 5(f)] the Secretary would have been permitted to weigh the charges relative to the non-sensitivity of petitioner's job only where the derogatory information related to "suitability" on non-political grounds, as distinguished from "suitability" on political grounds, *i.e.*, "subversion." Compare *Executive Order 10450*, Section 8(a)(1), with *Executive Order 10450*, Sections 8(a)(2) to (7). This fact is clearly set forth in Section 2 of the Health, Education and Welfare regulations, which, after setting forth the "clearly consistent" standard, provides:

> "It shall be the policy of this Department that action on cases involving personnel holding non-sensitive positions in which the relationship of the Government employment to the national security is remote shall normally be taken under routine personnel procedures if no part of the derogatory information relates to *subversion*." ("*Government Security and Loyalty*," *id.*, at p. 15:561. Emphasis supplied.)

The "necessary or advisable" standard of P. L. 733, as reflected in Section 6 of the Executive Order, is applicable solely to cases of summary suspension, since the "clearly consistent" standard of Executive Order 10450, Sections 2 and 7, relates to employee *retention* and or *termination*

as distinguished from such *suspension*. Furthermore, wherever the Executive Order uses the statutory standard, as it does in Section 6, the agency head is permitted to weigh the charges relative to the sensitivity of the employment. "*Government Loyalty and Security*," *id.*, at pp. 15:104, 15:564. But wherever the Executive Order uses the "clearly consistent" standard established by Sections 2, 8(a) and 7 of the Executive Order, the agency head is precluded from making this evaluation, except in cases solely concerned with employee "suitability" under Section 8(a)(1). Therefore, the only occasions upon which the Secretary may consider the sensitivity of the employee's position under the Executive Order is when the charges relate strictly to "suitability" on non-political grounds [*Executive Order 10450*, Section 8(a)(1)], or where summary suspension is deemed "necessary in the interests of the national security," pursuant to the statutory standard reflected in the language of Section 6 of the Presidential Order.[17] Further evidence for this conclusion may be found in the United States Civil Service Commission's "*Guides for Members of Security Hearing Boards Under Executive Order 10450*," IN-203, July, 1953, which provides:

> "The Executive Order further provides that the head of each agency shall * * * —suspend; and terminate in accordance with the act of August 26, 1950, the employment of any person whose retention in employment would not, *under the*

[17] It is true that Section 3(a) of the Order requires that each new appointment be investigated in terms of the possible adverse effect on security of the appointee's holding the particular position sought, but this applies only to new appointees, as opposed to incumbents. It is also true that Section 3(b) provides for the designation of certain jobs within an agency as sensitive, but this is only for the purpose of requiring a fuller than "minimal" investigation of their occupants.

standards of Executive Order 10450, be clearly consistent with the interests of national security." Hearings, Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21, March 25, 1955, pp. 764-765. [Emphasis supplied.][18]

Thus, respondents' claim that the "clearly consistent" standard of the Executive Order does not provide a more onerous standard of judgment than P. L. 733 (Res. Br. 45-48) does not square with either an analysis of the Order or with the recent historical record. *E.g., Hearings, Senate Subcommittee, Committee on Post-Office and Civil Service, pursuant to S. Res. 20,* 84th Cong., 1st Sess., June 2, 9, August 30, September 28, 1955, pp. 72-73, 79-80, 112-113, 522, 918-920; Yarmolinsky, "*Case Studies in Personnel Security,*" Bureau of National Affairs, August, 1955, pp. 14-19, 38-44, 54-59, 60-69, 70-79, 85-91, 128-132; Pet. Br. 44-47. Actually, the burden placed on the employee by the President's standard is very nearly intolerable; if called in question, few but the abnormally impeccable could safely predict that their characters and associations (past and

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[18] Respondents' further assertion (Res. Br. 43, 44-45) that Executive Order 10450 provides for dismissal only where the agency head determines that termination is "necessary or advisable in the interests of the national security" is equally spurious. The fact is that the Executive Order and all Agency Security Regulations adopted thereunder, including those of the Department of Health, Education and Welfare, explicitly provide that *no* employee will be retained in employment unless such retention "is found to be clearly consistent with the interests of the national security." *Executive Order 10450,* Sections 2 and 7; Security Regulations, *Department of Health, Education and Welfare,* Sections 2, 3(a), 5(f), Bureau of National Affairs, "*Government Security and Loyalty,*" pp. 15:561, 15:562-563, 15:565; Justice Department, *Sample Security Regulations,* Sections 2, 3(a), 5(g), *id.,* at pp. 15:101, 15:104-5; *Analysis,* Departmental Regulations, *id.,* at pp. 11:1-2, 11:34, 11:43.

present) could be shown to be "*clearly consistent*" with a concept so broad and ill-defined as the Executive Order's interpretation of "the interests of national security." On the other hand, the legislative history of P. L. 733 affirmatively indicates that Congress did not intend by the 1950 Act to exclude from Government all but the utterly pure. Its own standard was at once more flexible and realistic, for it only required discharge of an employee if, on the basis of both his job and the charges, removal was "necessary or advisable in the interests of the national security" (Pet. Br. 18-27).[19]

C. Congress Did Not Ratify Executive Order 10450 as Applied in This Case.

Respondents' argument with respect to the alleged ratification by Congress of Executive Order 10450 is misleading. At best, the evidence of ratification cited by respondents (Res. Br. 57-61) demonstrates Congressional acquiescence in the President's extension of the 1950 Act

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[19] Respondents exhibit a remarkable lack of imagination when they allege that it is "highly improbable, if not inconceivable," that a department head would determine an employee's dismissal to be "necessary or advisable in the interests of the national security," and then fail to discharge him (Res. Br. 45). While the department head could have determined, under the statute, that the dismissal of an employee holding a "sensitive" position was "necessary or advisable" in the national security interest, the department head was not required under P. L. 733 to discharge him. *The statute gave him discretion either to discharge the employee or transfer him to a "non-sensitive" position within the agency* (Pet. Br. 18-20). It is that discretion which the Executive Order destroys in all cases other than those which fall under the criteria of Section 8(a)(1).

to all government departments and agencies.[20] This does not mean that in any specific case Congress ratified the application of the statute to a concededly loyal employee employed in a non-sensitive, non-policy-making position in a non-sensitive agency, either by the agency head or by the Presidential Order. In fact, representatives of the Executive branch, testifying on the operation of the statute as extended by the Executive Order, repeatedly informed Congressional committees that neither the statute nor the Executive Order is used to discharge as a "security risk" a concededly loyal employee holding a non-sensitive, non-policy-making position in a non-sensitive agency. For example, on May 14, 1953, shortly after the issuance of Executive Order 10450, respondent Moore, a Commissioner of the United States Civil Service Commission, stated publicly that: "* * * one of the first

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[20] Senator Carlson, Chairman of the Senate Committee on Post Office and Civil Service in the 83rd Congress, made this clear when he said: "Section 3 of Public Law 733 provides that the provisions affecting the foregoing departments and agencies shall apply to such other departments and agencies of the government as the President deems necessary. *The Executive Order under consideration merely extended Public Law 733 to the rest of the Federal service.*" *Hearings, Senate Committee on Post Office and Civil Service on Employees' Security Program*, 83d Cong., 2nd Sess. March 2, 1954, Appendix "A" to *Hearings before a Senate Subcommittee of the Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., at p. 973. [Emphasis supplied.] The Congressional debates surrounding the "McCarran riders" to the Appropriation Bills for the Departments of State, Commerce and Justice (Res. Br. 58-60) are demonstrable of no more, of that. The "riders" provided for summary, unappealable dismissal of employees of these Departments "when necessary or advisable in the interests of the United States," in the discretion of the department heads concerned, but contained no provision for "hearings." Since P. L. 733 required a hearing and specifically included the Departments of State, Commerce and Justice by its terms (5 U. S. C. 22-1), and since Executive Order 10450 also contained provisions for "hearing," the McCarran riders were deemed "surplusage," and less fair to the employees of these Departments than the Executive Order. See *99 Cong. Rec. 4513*, Remarks of Congressman Murray.

acts of President Eisenhower was to make certain that our Government is free from disloyal employees and from security risks in *sensitive positions.*" *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20,* 84th Cong., 1st Sess., May 26, 1955, at p. 13. [Emphasis supplied.] On March 8, 1955, almost two years after the issuance of Executive Order 10450, Mr Tompkins, Assistant Attorney General, testified as follows:

> "Mr. Tompkins: * * * At the request of the Department of Defense, Congress, in 1950, passed Public Law 733—act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1, *et seq.*). It was pointed out both by congressional committees and those who testified at the hearings on the bill that alcoholics, people with unsatisfactory associations, people subject to blackmail, people who talked too much, could constitute a serious danger to the security of the United States even though not necessarily proved disloyal.
>
> "There is and was no doubt, of course, that those who are disloyal should not be working for the Government.
>
> "Senator Humphrey: Just as a point of information. Are there not procedures under civil service for the removal of persons the likes of which you have just described? I mean people who are not necessarily disloyal, whose patriotism to the Nation or their loyalty to the Nation is unquestioned, but whose work habits or social habits or living habits are highly undesirable? Can such persons be removed from Government employment without the security regulations?
>
> "Mr. Tompkins: You are quite correct, that they could be removed, but they could be removed only after a statement and charges and an opportunity to answer those statements or charges is given the individual.
>
> "Under the security program, *if in a sensitive position,* they may be gotten out immediately. They may be suspended. I think that is the only difference." *Hearings, Senate, Subcommittee, Com-*

mittee on Government Operations on S. J. Res. 21, March 8, 1955, pp. 91-92. [Emphasis supplied.] [21]

Mr. Tompkins also testified that the President had no authority to divest the agency head of his statutory discretion under P. L. 733. *Hearings, id.*, at pp. 59-60. While respondents alleged that Mr. Tompkins "meant" only that the President had no power to change the procedural steps leading to dismissal which P. L. 733 prescribes (Res. Br. 52, ftn. 32), Mr. Tompkins nevertheless assured Senator Cotton that the Senator was correct when he asked:

> "Am I correct in my understanding that the Congress in its infinite wisdom has written into the law that each department head has complete authority in determining procedures in his department in connection with security?" (*Ibid.*)

So, whatever Mr. Tompkins "meant" to say, Congress was informed that the department head had "complete authority" in determining procedures in his department in connection with security (*Ibid.*). In addition it was well known that Mr. Kimball, Undersecretary of the Navy, had informed the Legislative branch that the decision to apply or not to apply the statute would have to rest in the discretion of the several department heads, varying from agency to agency and from position to position, depending upon the relative degree of sensitivity of the various agencies and various positions within those agencies. *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, at pp. 69-73. Thus, Congress never understood,

[21] See also: *Hearings, id.* at pp. 96, 99-100, 125-126. While respondents attempt to destroy the force of this testimony (Res. Br. 61-62, ftn. 22), the fact that Mr. Tompkins was contradicted on March 9, 1955, by Governor Brucker caused the Acting Counsel of the Subcommittee to remark, with respect to alcoholics:

> "Mr. Greene: Governor Brucker, I am somewhat confused by this because yesterday when Mr. Tompkins appeared before the Committee he stated, I think on three separate occasions, that an individual who is a drunk and occupies a nonsensitive position would not be subject to Executive Order 10450." *Hearings, id.*, at p. 161.

at any time, that P. L. 733 was required by the Presidential Order to be applied by the agency head to each and every employee, loyal and disloyal alike, in each and every agency of the Government, irrespective of the degree of sensitivity of the employee's position.

The doctrine of Congressional ratification presupposes knowledge on the part of Congress as to the Executive acts ratified. Cf. *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U. S. 373, 378-379; *C.I.R.* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431. In the case at bar, not only is it clear that Congress was never made aware that P. L. 733 and Executive Order 10450 were applicable to a concededly loyal employee holding a non-sensitive position in a non-sensitive agency, but responsible officials of the Executive branch assured Congressional committees that such was not the case. If, as respondents observe (Res. Br. 61-62, ftn. 22), there was "*[a]ny misunderstanding*" created by the testimony of Assistant Attorney General Tompkins, the fact that it may have been subsequently dissipated is nevertheless destructive of respondents' assertion.[22] Misunderstanding is not knowl-

[22] Whether or not this "misunderstanding" has been resolved in the Executive branch is open to serious question. See *Hearings, Senate Subcommittee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., September 28, 1955 at p. 947. The difficulty with respondents' position is that Congress was never aware, nor did the Executive branch ever attempt to make it aware, that a concededly loyal employee holding a non-sensitive position was to be considered, if he associated with Communists, anything different from "unsuitable," *e.g.*, an "alcoholic" or an "adulterer." Cf., testimony of Edward R. Dixon, *Hearings, id.*, at pp. 564-576. When respondent Young was asked about this particular problem, as it related to the Veterans Administration, he replied: "Are you suggesting, Senator, that a Communist in a non-sensitive job is not a security risk?" *Hearings, Senate Committee on Post Office and Civil Service on Employees' Security Program*, 83rd Cong., 2nd Sess., March 10, 1954, Appendix "A," *id.* at pp. 1040-1041. It is just this kind of failure to define clearly the concept of "security risk" that has caused repeated Congressional "misunderstanding" as to the operation and effect of Executive Order 10450.

edge, and without knowledge Congress could not have ratified the invalid and *ultra vires* action complained of in the instant case.

D. The President Could Not Validly Divest the Agency Head of Her Statutory Discretion.

The total effect of these features of the Executive Order was to deprive the department and agency heads who were charged with administering the statute of any real discretion in "security" cases, particularly where, as here, security was nowhere involved. However, it was precisely because these officers were best able to judge the highly variable sensitivity of the work which they supervised that Congress had given them "absolute discretion" in the matter (Pet. Br. 19, 35-37). The President was empowered to extend the provisions of the Act to new departments and agencies, no more. We do not suggest that he could not issue advisory instructions to guide agency heads; but he could not issue binding orders, restricting or altering their discretion and changing the statutory standards. If authority for this proposition were needed, *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, provide it. Even in the area of military justice, it has been held that the Convening Authority cannot properly exercise his discretion to remit or suspend court-martial sentences under Articles 64 and 71 of the Uniform Code of Military Justice (64 Stat. 128, 50 U. S. C. 651, and 64 Stat. 131, 50 U. S. C. 658, respectively), where he announces that he will not consider the retention of any military personnel sentenced to punitive discharge. *United States* v. *Wise* (U. S. Ct. Mil. App. No. 6937, November 4, 1955), 6 USCMA ——, 20 CMR ——, 24 Law Week 2209. In the *Wise* case, the Court of Military Appeals held that although the Convening Authority had absolute discretion to approve the sentence, he was required first to consider the record with an open mind before rendering his decision.

We have shown in detail how the Executive Order conflicts with the statute generally, and specifically in petitioner's case. That order was far more than an implementation of the Act, a mere laying down of lines. Respondents imply, however (Res. Br. 49-56), that if there is such a conflict, the statute must yield; they evidently ignore the contrary decisions of this Court on that question. In *United States* v. *Perkins*, 116 U. S. 483, it was held that where Congress vests the appointment of inferior officials in the heads of departments, pursuant to the second clause of Article II, Section 2, of the Constitution, it can also restrict and regulate their removal by the same department heads.[23] In *Eberlein* v. *United States*, 257 U. S. 82, the Court carried this reasoning to its logical conclusion, holding that where Congress has in fact vested the appointment and removal of inferior officials in a department head, the President can not interfere with the latter's authority. Although the *Eberlein* case involved the President's attempt to reinstate a customs official whom the Secretary of the Treasury had removed, its reasoning is no less valid here.

III

The Secretary failed to give petitioner "a written statement" of her "decision" to dismiss him in accordance with P. L. 733.

The Secretary's notice of her decision to terminate petitioner's employment failed to state the reasons for that decision. In answer to petitioner's contention that this too invalidated his discharge, respondents make the obvious point that P. L. 733 does not *in haec verba* require such

[23] The *Perkins case* left open the question of Congress' right to restrict removals of officials whose appointment it had vested directly in the President. Cf. *Myers* v. *United States*, 272 U. S. 52. But that issue is not presented on the facts of this case, either.

reasons. However, the question really is what Congress intended by the statutory language, "a written statement of the decision of the agency head." We think it meant to require a statement of reasons rather than a bare pronouncement of the result. Cf. *Gonzales* v. *United States*, 348 U. S. 407.

The history of the statute shows that Congress placed particular reliance on the safeguard requiring agency heads to review and independently decide each case under the Act where dismissal was recommended. "It is the intention that the head of a department can delegate his authority to suspend an employee but he cannot delegate his power to terminate the services of an employee who has been suspended under this legislation." *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 3 (1950); Pet. Br. 49. Yet the safeguard is meaningless unless the record clearly shows the department head's reasons for exercising his authority. The reasoning of the court below in *Mulligan* v. *Andrews* (C. A. D. C.), 211 F. 2d 28, is not restricted to the specific statute in that case; it has independent validity:

> "The purpose of requiring this content for the 'reason' for removal is not to provide a record to facilitate judicial review of such 'reasons' on their merits since review is narrowly limited in the absence of express statutory provision therefor. On the contrary, it is required as a procedural safeguard against just the sort of errors which, if committed at the administrative level, are beyond the reach of our review." *Id.*, 211 F. 2d, at p. 31.

The point is illustrated by respondents' second contention in this regard, *viz.*, that the Secretary's letter of termination, referring to the statement of charges and petitioner's refusal to explain those charges, was a sufficient statement of reasons in any event. Of course, petitioner's refusal to answer the charges was not a ground for dis-

missal under the statute;[24] the Secretary had authority to dismiss him only for actual reasons of national security. She could not take a default judgment by reason of such refusal, for the Act imposed upon her the ineluctable duty to make an independent review and decision before firing petitioner.

Similarly, the fact that the charges had nothing added or subtracted since their issuance is no answer, for the Secretary was required to review the charges, including the facts supporting them, before reaching her decision. Although petitioner had the right to answer or explain those charges and to request a hearing, despite his failure to do so the Secretary had the duty to consider which, if any, of the charges was proven to her satisfaction and further which, if any, of the proven charges warranted termination.[25] Her compliance with the statute in this respect could only be shown if she set forth the basis of her final decision. It is this which the statute requires in the form of a "written statement" of her decision.

The court below and respondents reason too narrowly when they say that a "decision" is only the result, whereas an "opinion" states the reasons. Moreover, they misapply judicial terminology to the administrative world. In the latter field, the word "opinion" is a rarity and, as we pointed out in our prior brief, an administrative "decision" commonly includes a statement of the reasons as well as

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[24] Nor is it listed among the factors to be considered under Executive Order 10450. See Section 8(a) of that Order.

[25] Presumably, under respondents' reasoning, even where statutes explicitly require a statement of reasons, the charges themselves would always suffice if in the opinion of the agency head they were neither explained nor vitiated prior to the final decision. Yet courts require that the actual reasons for that decision also be stated. See, *e.g.*, *Mulligan* v. *Andrews* (C. A. D. C.), 211 F. 2d 28. For the same reason, Secretary Hobby's reference to "all the documents in your case" (R. 21) was patently inadequate.

the result. Congress is as aware of that usage as this Court (See *Pet. Br.* 50). Therefore, it seems plain that in requiring the Secretary to give a "written statement" of her decision to discharge petitioner under the statute, Congress required that she set forth the grounds for that decision. If she purported to do so in her letter of January 15, 1954 (R. 21), it is clear enough that the "reason" mentioned there, petitioner's failure to explain the charges against him, would not support dismissal under P. L. 733. However, we think it more true to say she gave no reasons,[26] and therefore failed to comply with the Act. On this ground also, petitioner's discharge was invalid.

[26] The reference to "all the documents" was not adequate. *Op. cit.*, *Supra*, ftn. 25.

CONCLUSION

For the reasons set forth herein, the judgment of the court below must be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1955

Kenneth M. Cox, petitioner,

v.

Philip Young, Chairman, Thomas M. Moore, and Paul[illegible] Members of the United States Civil Service Commission, and Oveta Culp Hobby, Secretary, Department of Health, Education and Welfare.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, PETITIONER

v.

PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the United States Civil Service Commission, and OVETA CULP HOBBY, Secretary, Department of Health, Education and Welfare

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals have not been officially reported but are set out in Appendix "C" of the petition. The opinion of the district court (J.A. 45-53),[1] is reported at 125 F. Supp. 284.

[1] References to the Joint Appendix filed in the court of appeals will be indicated by "J.A. —." References to the petition will be indicated by "Pet. —."

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1955 (R. 66). The petition for a writ of certiorari was filed on October 3, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Executive Order 10450 validly conferred authority upon the Secretary of Health, Education and Welfare to remove, pursuant to the provisions of the Act of August 26, 1950, a Food and Drug Inspector in that Department.

2. Whether Executive Order 10450, after a finding by the President that such action was necessary in the best interests of the national security, could validly implement the Act of August 26, 1950, by directing that each department and agency head establish an effective program to insure that the retention in employment of any civilian officer or employee be clearly consistent with the interests of the national security.

3. Whether a department head's letter to an employee which refers to written charges previously brought against the employee, to the sections of Executive Order 10450 upon which the charges were based, and to the employee's refusal to answer such charges, and states that his employment is being terminated because it has been determined that his continued employment is not clearly consistent with the interests of national security, is a "written statement of the decision" of the department head within the intendment of the Act of August 26, 1950.

STATUTES, EXECUTIVE ORDER AND REGULATIONS INVOLVED

The statutes and Executive Order involved are set forth in pertinent part in Appendix "A" of the petition (Pet. 24-33) and in the Appendix to this brief at pages 22-23. The pertinent portions of the regulations of the Department of Health, Education and Welfare are set forth in the Appendix to this brief at pages 24-25.

STATEMENT

Petitioner, who has veteran's status under the Veterans' Preference Act of 1944 (58 Stat. 387, 5 U.S.C. 851 *et seq.*), held a position in the classified civil service as a Food and Drug Inspector in the New York District of the Food and Drug Administration in the Department of Health, Education and Welfare. In that position he did not have access to government secrets or classified material and was not in a position to influence policy against the interests of the Government (J.A. 3, 37, 40). In October, 1953, petitioner was interviewed by the Chief of Personnel Security of the Department of Health, Education and Welfare in connection with an investigation regarding his retention in employment under the Government employees security program, a program established by Executive Order 10450 (18 F.R. 2489) pursuant to the authority granted in the statutes cited therein. During this interview petitioner was questioned concerning his attitudes, associations and friends (J.A. 3, 37).

On November 13, 1953, petitioner received a notice of suspension "pending investigation under

Executive Order 10450" (J.A. 3, 38). The Under Secretary of the Department of Health, Education and Welfare, by letter dated November 25, 1953 (J.A. 16-18), informed petitioner of the reasons for his suspension and set forth the following written statement of charges:

> 1. That you established and have continued a close association with individuals reliably reported to be Communists.
> 2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.
> 3. That you have, by your own admission, donated funds to the Nature Friends of America.
> 4. That you have contributed your services in the form of work to the Nature Friends of America.
> 5. That you have attended social gatherings of the Nature Friends of America. [J.A. 16, 17.]

The letter further informed petitioner that he might submit within thirty days statements or affidavits refuting or explaining the charges and that he was entitled to a hearing if he requested one.

On December 23, 1953, petitioner replied to the letter of the Under Secretary, refusing "to make

any explanation regarding the associations carried on in my private life" on the following grounds:

> * * * I consider any request by the United States Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of "freedom of association." [J.A. 19.]

Petitioner was thereupon informed by the Department, by letter of January 4, 1954, that since it appeared from his letter that he did not desire a hearing, his case had been forwarded to the Secretary for final disposition and he would be advised of the determination made (J.A. 20).

On January 15, 1954, the Secretary, after referring to the letter of the Under Secretary, to the statement of charges, to the sections of the Executive Order upon which the charges were based, to petitioner's reply refusing to offer any explanation "regarding the associations carried on in your private life", and to his declared intention to "continue to associate with any persons or groups of persons whom you see fit to choose", advised petitioner that:

> "Based on a study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national secu-

> rity. Therefore, your termination has been ordered effective at the close of business January 20, 1954. [J.A. 21.]

On January 27, 1954, petitioner's counsel sought to reopen petitioner's case on the ground that petitioner had been in a "post-operational depression," but now believed he could refute the charges against him (J.A. 22, 23). Sworn affidavits were enclosed with the letter (J.A. 24-26). Petitioner's counsel again wrote the Department on January 29, 1954, stating that if a hearing were granted petitioner would disprove the charges (J.A. 27). The Secretary advised petitioner's counsel on February 4, 1954, that the request for reopening was denied (J.A. 28). On February 10, 1954, petitioner's counsel again wrote the Secretary reiterating his previous statements and asserting various procedural and constitutional problems (J.A. 29-31). On February 24, 1954, the Secretary replied, again declining to reopen the case, stating that petitioner's separation was accomplished in accordance with Executive Order 10450, and that the validity and constitutionality of the Executive Order and the constitutionality of the Act of August 26, 1950 were not matters to be determined by that Department (J.A. 32).

Petitioner appealed his discharge to the Second Civil Service Region on February 25, 1954, claiming violations of the Veterans' Preference Act and the Civil Service Commission's regulations thereunder. The Civil Service Regional Director de-

clined to accept this appeal, on the ground that the Veterans' Preference Act is not applicable to determinations made pursuant to the Act of August 26, 1950, and Executive Order 10450. On petitioner's appeal to the Civil Service Commission this ruling was affirmed (J.A. 33-36).

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment invalidating his discharge by the Secretary of Health, Education and Welfare; for similar relief declaring the refusal of the Civil Service Commission to hear petitioner's appeal to be null and void and in violation of the Veterans' Preference Act; and for an order restoring him to his position as a Food and Drug Inspector as of the date of his discharge (J.A. 2-13).

After the filing of the answer, petitioner and respondents filed cross-motions for judgment on the pleadings. On October 26, 1954, the district court, holding that the Executive Order validly extended the coverage of the Act of August 26, 1950, to include petitioner, granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (J.A. 53). On appeal the court of appeals affirmed, Edgerton, C. J. dissenting. (Pet. App. "C", pp. 39-49).

ARGUMENT

This case, predicated upon the removal of petitioner from his position in the classified civil service, attacks both the validity of Executive Order

10450 (18 F.R. 2489) in the light of the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. 22-1 *et seq.*), and the validity of the action taken thereunder in petitioner's case with respect to the sufficiency of the notice of dismissal. The case presents solely questions of the interpretation and application of the Act and of the Executive Order. As petitioner concedes (Pet. 22), his dismissal does not give rise to the constitutional issue involved in *Bailey* v. *Richardson*, 341 U.S. 918, and *Peters* v. *Hobby*, 349 U.S. 331. There is no conflict and no occasion for further review by this Court.[2]

1. Petitioner basically contends that his discharge is void on the ground that the provisions of the Act of August 26, 1950, permitting summary dismissal without the right of appeal to the Civil Service Commission as provided by the Veterans' Preference Act, were invalidly applied to him. His position in this regard appears to be twofold: (a) that Executive Order 10450 was illegal insofar as it attempted to extend the 1950 Act to a person in the position of a Food and Drug Inspector in the Department of Health, Education and Welfare, and (b) that even if he could be subjected to an adjudication under the Act, the Secretary nevertheless could not reasonably find that petitioner's dismissal was justified in the interests of national security. Both contentions have been properly re-

[2] In alleging conflicts (Pet. 18-21), the term is not used in the sense commonly used in petitions for certiorari to indicate contrary decisions in other circuits, but rather to indicate petitioner's belief that the case was incorrectly decided on the basis of principles enunciated by this Court.

jected by the courts below on the basis of the clear language of the statute and its purpose as expressed in the legislative history.

It has long been recognized that sole authority over the tenure and removal of employees in the Executive branch of the Government is, under the Constitution, a matter for Executive discretion, except as Congress may validly impose statutory requirements concerning the removal of "inferior Officers." U.S. Const., Article II, Section 2. *Myers v. United States*, 272 U.S. 52. In 1944 Congress passed the Veterans' Preference Act, 58 Stat. 387 (5 U.S.C. 851 *et seq.*). As thus far interpreted, Section 14 of that Act, requiring that an employee possessing a veterans' preference be permitted to appeal his proposed discharge to the Civil Service Commission, represents a valid limitation upon the Executive power of removal. But in this field, as in dismissal cases generally, judicial inquiry has been restricted to the question of compliance with statutory requirements. At no time have the courts intervened to review the basis for executive action or to substitute their judgment for that of the officials. *Eberlein v. United States*, 257 U.S. 82; *Keim v. United States*, 177 U.S. 290; *Carter v. Forrestal*, 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832.

In enacting the Act of August 26, 1950, Congress created an exception to all prior limitations by permitting, "notwithstanding the provisions of * * * any other law", the summary dismissal of "any civilian officer or employee" in specified de-

partments and agencies when the department or agency head determines that such termination is "necessary or advisable in the interest of the national security of the United States.* * *." Congress further provided, in Section 3 of the Act of August 26, 1950 (5 U.S.C. 22-3), that this summary dismissal power should apply to such other departments and agencies of the Government "as the President may, from time to time, deem necessary in the best interests of national security." It is significant that the phrase *any* civilian employee is used in the Act without any restriction as to the sensitivity of the position occupied by the incumbent.

It is clear, therefore, that when the President, "deeming such action necessary in the best interests of the national security" (Preamble, Executive Order 10450), ordered that the provisions of the Act "shall apply to all other departments and agencies of the Government," he was acting in accordance with and in a manner contemplated by the plain provisions of the statute. It is further clear that the effect of the Executive Order was to extend the Act's coverage to all "civilian officers and employees" of the Executive branch, including petitioner, and thus to do away with any rights which petitioner might otherwise have had under the Veterans' Preference Act or the Lloyd-LaFollette Act (37 Stat. 555, 5 U.S.C. 652).

The petitioner does not question that the President intended thus broadly to extend the Act, but argues rather that the Act, despite its plain word-

ing, did not authorize him to do so. Resort is had to the legislative history in an attempt to restrict the application of the Act to persons holding "sensitive" or "policy-making" positions, despite the fact that neither of these phrases can be found in the statute. Petitioner thus seeks to read into the statute restrictions on the power granted to the President which are nowhere expressed in the Act itself. As the court below stated:

> * * * The trouble with the argument is that the statute itself is explicit on the point. * * * The statute puts the selection of the agencies to be affected in the hands of the President. It says nothing about sensitiveness or policy-making. The basic provision of the statute (Section 1) applies in terms to "any civilian officer or employee" in the named departments and agencies. When the President, under Section 3, * * * makes the statute applicable to other departments, he makes the "any civilian" provision applicable. [Pet. App. "C", p. 41.]

In view of the clarity of the language and the absence of any hint of the restrictive provisions for which petitioner contends, it would require an overwhelming legislative history to justify the bald rewriting of the statute which petitioner seeks. On the contrary, both Committee Reports make it clear that the President could extend the "coverage of this act to any department or agency when, in his opinion, the national security requires it." Sen. Rep. No. 2158, 81st Cong., 2d Sess., p. 3. See

also H. Rep. No. 2330, 81st Cong., 2d Sess., p. 2. While the Reports speak of "Federal employees who, although loyal, are so careless as to jeopardize the national security" and "poor security risks" (Sen. Rep. No. 2158, *supra*., p. 2), the Committees made no attempt whatsoever to define what they meant by "security risks".

A comparison of the legislative history with the actual words of the statute compels the conclusion that Congress deliberately used the broad language authorizing suspension and termination of the employment of "any civilian officer or employee" when such action was deemed necessary "in the interest of the national security" in order to confer upon the Executive branch unfettered discretion in insuring that the national security would not in any way be jeopardized through the actions of any employee in that branch.

2. Petitioner further appears to contend (See Pet. I(a)) that, even if Executive Order 10450 validly extended the application of the 1950 Act to permit the Secretary to consider the summary dismissal of petitioner under its provisions, the Secretary nevertheless could not reasonably have reached the conclusion that it was necessary or advisable in the interests of national security to terminate the employment of petitioner, a "loyal employee, employed in an Agency which is not primarily concerned with vital matters affecting the national defense or security and who has no access to any government secrets or classified information and who occupies a position where he

cannot influence policy against the interests of the United States * * * " (Pet. 11). The argument would seem to be, in essence, that the Secretary, in determining whether the interests of national security required petitioner's dismissal, totally failed to consider the relationship between petitioner's job and the national security. Petitioner thus in effect attacks the factual basis of his discharge.

His failure to set forth a clear formulation of this attack is undoubtedly due in part to petitioner's awareness of the customary refusal of the courts to inquire into the adequacy of the grounds upon which employees have been dismissed, limiting judicial inquiry in such cases to determining whether the procedural requirements have been followed (*Eberlein* v. *United States, supra*; *Keim* v. *United States, supra*; *Carter* v. *Forrestal, supra*) and in part to the fact that this general principle has been incorporated in the Act itself. The determination by the department or agency head that termination is "necessary or advisable in the interest of the national security" is stated to be "conclusive and final" as well as discretionary. Since Congress made no attempt to define the circumstances which would render it necessary or advisable in the interests of national security that employment be terminated, the delegation of discretionary power necessarily carried with it the discretion to determine the requirements of "national security" and petitioner's relationship thereto. Accordingly, the regulations of the Department of

Health, Education and Welfare issued pursuant to the Act and the Executive Order required that in reaching her determination in a case such as petitioner's the Secretary take into consideration "(1) the seriousness of the derogatory information developed, (2) the possible access, authorized or unauthorized, of the employee to security information or material, and (3) opportunity, by reason of the nature of the position, for committing acts adversely affecting the national security." (Appendix, *infra* pp. 24-25.) It is not lightly to be assumed, as petitioner's argument would require, that the Secretary ignored her own regulations. Indeed, there is no showing at all that the Secretary's discretion has been abused in this case. And it is difficult to conceive of a case which would justify the court's intervention to substitute its own interpretation of the requirements of national security for that of the Secretary, an executive officer and member of the cabinet, particularly where that officer is dealing with the removal of executive personnel.

3. It is asserted, however, that the Secretary was in fact deprived of her statutory discretion by the terms of Executive Order 10450. There is no merit in this contention and it was properly rejected by the court below.

The Act provides that the head of a department or agency "may" summarily terminate employment "whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States * * *." The

Executive Order states that the department or agency head "shall" terminate employment whenever the same determination is made. An objection based upon this difference is wholly without substance. It is inconceivable that the head of a department or agency would determine that an employee's dismissal was "necessary or advisable in the interest of national security" and then fail to exercise the dismissal power conferred by the statute in such circumstances, especially when the sole purpose of making such a determination is to enable the agency head to exercise that power. The real, operative discretion which was given by Congress was not with respect to terminating the employment but with respect to reaching the initial determination, and that discretion is reiterated, not destroyed, in the Executive Order.

In requiring the exercise of the dismissal power whenever the department or agency head reached the determination for which the statute provided, the President was, as the court below recognized, properly acting in his capacity as Chief Executive.[3] There is no indication that Congress, in placing dis-

[3] In this connection the court of appeals held that this and other aspects of Executive Order 10450 did not conflict with the statute; and went on to note that had it reached a contrary conclusion, as did the dissenting judge, it would be forced to decide the grave constitutional issue of whether the President, in the exercise of the "executive power," might not have the authority to order the summary dismissal of any employee in the Executive branch whose retention he or his delegated subordinates deemed not clearly consistent with the national interest. The issue thus raised would be whether Congress could constitutionally deprive him of that power.

vention in the heads of departments or agencies, intended to interfere with the President's normal function of giving broad direction to the actions of his subordinate officers in the Executive branch in dealing with an executive matter. The court below held that congressional recognition of this traditional role of the President was "implicit in the enactment" and "must be conclusively presumed" (Pet. App. "C", p. 43).

The President was similarly exercising his broad powers of direction of the affairs of the Executive branch when he in effect declared that, in carrying out their statutory function of determining whether it is necessary or advisable that an individual's employment be terminated, his subordinate department and agency heads should be guided by the principle that no person should be retained as an employee unless his retention was clearly consistent with the interests of national security. Petitioner's contention that the Executive Order substitutes "a more onerous standard of judgment" (Pet. 19) than that prescribed by the Act was fully answered by the court below:

> But we think the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute * * *. [Pet. App. "C", p. 42.]

The fact that the program established by Executive Order 10450 is aimed at making certain that the retention of all employees is "clearly consistent with the interests of the national security" does not, as petitioner appears to contend, preclude the weighing by the Secretary of the potential effect on national security of petitioner's retention against the seriousness of the adverse information developed in his case. On the contrary, the Executive Order affirmatively requires such a consideration.

The court went on to point out that, in essence, petitioner complains because the Secretary, in the exercise of her admitted authority to act, followed a policy and program laid down by her superior, and argues from this that the Secretary's action is void. "That position is untenable on its face." (Pet. App. "C", p. 44).

It is further clear that the program established by Executive Order 10450 does not, in fact, establish a system which, as petitioner contends, ignores the relative sensitivity of various positions in the Executive branch. Sections 3(a), 3(b), and 8(a) of the Order all contain provisions which emphasize the need to consider "the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security * * *." Section 3(a), Appendix, p. 22, *infra*. These provisions make it manifest that the Executive Order does not ignore the principle that an employee may, on certain security grounds, be unsuitable for employ-

ment in one Government position but not in another.[4]

4. Petitioner's final contention is that his notice of discharge was defective because the Secretary's letter of January 15, 1953 (J.A. 21) "failed to set forth any of the reasons" for her determination (Pet. 20). This contention, as the court below held, is also without merit in the circumstances of this case.

The Act requires that, upon suspension, the employee "shall be notified of the reasons for his suspension," to the extent permitted by security considerations. In accordance with this provision, petitioner was notified of the reasons for his suspension in the letter from the Under Secretary of the Department of Health, Education and Welfare, dated November 25, 1953 (J.A. 16-18), which letter also fulfilled the statutory requirement that the employee be given a "written statement * * * of the charges against him * * *." After opportunity to answer the charges and to request a hearing, the Act provides that the employee "shall be given * * * a written statement of the *decision* of the

[4] These provisions are also clearly authorized by Section 1753 of the Revised Statutes, 5 U.S.C. 631, cited in Executive Order 10450, the provisions of which authorize the President to "prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties * * *."

agency head * * *." It is this last requirement which petitioner contends has not been fulfilled.

It is clear that the Secretary's letter fully apprised petitioner of the basis upon which the determination rested. Specific reference was made to the letter of the Under-Secretary, to the statement of charges, and to the sections of the Executive Order upon which the charges were based. Reference was likewise made to petitioner's reply, to his refusal to offer any explanation "regarding the associations carried on in your private life," and to his statement that he intended to continue "* * * to associate with any persons or groups of persons whom you see fit to choose." The letter then stated that the Secretary's conclusion was "[b]ased on a study of all the documents in your case, including your reply to reference letter * * *."

In the light of petitioner's refusal to request a hearing, it is clear that the Secretary could have given him no more elaborate or detailed statements of the "reasons" for his dismissal than she did. Nothing had been added to the case for or against petitioner since the charges were issued. Petitioner does not complain of the sufficiency of the statement of charges, and it must be presumed that the charges were "stated as specifically as security considerations permit," as the Act required. The Secretary consequently could do no more in furnishing the statement of her decision than to refer again to the statement of charges.

Petitioner likewise complains that the Secretary "never made a determination that petitioner's

dismissal was 'necessary or advisable in the interest of the national security of the United States' * * *" (Pet. 19). This is an insubstantial contention. The letter of the Secretary states that "* * * it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954" (J.A. 21). But where the President has determined that national security requires that no employee be retained unless his retention is clearly consistent with the interests of national security, the Secretary's determination that petitioner's continued employment was not clearly consistent with the interests of national security, followed by her termination of his employment, clearly constituted a determination that his termination was necessary or advisable in the interests of national security. Her action was thus in conformity with both the Act and the Executive order.

The only question of any general application in this case is that raised by petitioner's contention that Congress did not intend that the Act of August 26, 1950, be extended in the manner accomplished by Executive Order 10450. In view of the virtually unprecedented congressional and, indeed, public awareness not only of the existence but of the detailed provisions of this particular Executive Order, this contention is answered by the fact that Congress, in the two and one-half years of its op-

eration, has made no attempt to alter this Executive action by legislation, even if it constitutionally could do so.[8]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Attorneys.

NOVEMBER, 1955.

[8] On May 5, 1953, the full texts of both the Act of August 26, 1950 and Executive Order 10450 (promulgated April 27, 1953) were inserted together into the Congressional Record during the course of debate upon certain appropriation act riders which would have given the heads of the Departments of State, Justice and Commerce absolute discretion to fire employees "in the interest of the United States." 99 Cong. Rec. 4511-4543. After extended debate, including discussion of the relationship between the Executive Order and the Act, the riders were defeated, it being the sense of the House that Executive Order 10450, properly promulgated under the Act of August 26, 1950, adequately covered the field and provided necessary protection for employees through the provision for hearings. 99 Cong. Rec. 4543.

[9] See note 3, *supra*, p. 15.

Executive Order 10450, 18 F.R. 2489, as amended:

* * * * *

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there

shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

* * * * *

Section 5 of the Regulations relating to the security program of the Department of Health, Education, and Welfare, promulgated September 24, 1953, provides in pertinent part:

Section 5. *Suspension and Termination*

(a) With respect to any employee on whom sufficient derogatory information exists to indicate the need to recommend suspension to the Secretary, the Director of Security shall, before submitting his recommendation, make available to the head of the appropriate constituent organization, and to the Office of the General Counsel, pertinent facts for comment. Their comments will be incorporated in the report of the Director of Security which shall be submitted to the Secretary with his recommendation.

(b) Thereafter, if the Secretary deems suspension necessary in the interest of national security, the Personnel Officer shall be directed to suspend the employee immediately. If she does not deem such suspension necessary, a written determination to that effect shall be made a part of the investigative file of the person concerned.

(c) Factors to be taken into consideration in making the determination required by subsection (b) of this section shall include, but shall not be limited to, (1) the seriousness of the derogatory information developed, (2) the possible access, authorized or unauthorized, of

the employee to security information or material, and (3) opportunity, by reason of the nature of the position, for committing acts adversely affecting the national security. Pending final determination in cases in which ameliorating circumstances are present, the employee may, with the approval of the Directors of Security and Personnel, be transferred temporarily to a position in which the interests of the national security cannot be adversely affected by the employee.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, PETITIONER

v.

PHILIP YOUNG, CHAIRMAN, GEORGE M. MOORE, AND FREDERICK J. LAWTON, MEMBERS OF THE UNITED STATES CIVIL SERVICE COMMISSION, AND MARION B. FOLSOM, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 45) is reported at 125 F. Supp. 284. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 55) is reported at 226 F. 2d 337.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 64). The petition

for a writ of certiorari was filed on October 3, 1955, and was granted on November 21, 1955 (R. 65). The jurisdiction of this Court rests upon 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the Act of August 26, 1950, Public Law 733, 81st Congress, which empowers the heads of specified departments and agencies to dismiss employees in the interests of the national security and also provides that "[t]he provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security," authorized the President to extend, by Executive Order 10450, the provisions of the Act to agencies such as the Department of Health, Education, and Welfare.

2. Whether, after finding that such action was "necessary in the best interests of national security," the President could validly implement Public Law 733 by directing, in Executive Order 10450, that department and agency heads be guided, in exercising the authority vested in them by that Act to dismiss employees whenever they determine such termination to be "necessary or advisable in the interest of the national security," by the principle that no person should be employed unless his employment is "clearly consistent with the interests of the national security."

3. Whether a department head's letter to an employee which refers to written charges previously brought against the employee, to the sections of Executive Order 10450 upon which the charges were based, and to the employee's refusal to answer such charges, and states that his employment is being terminated because it has been determined that his continued employment is not clearly consistent with the interests of national security, is a "written statement of the decision" of the department head within the meaning of Section 1 of Public Law 733.

STATUTES AND EXECUTIVE ORDER INVOLVED

P. L. 733, 81st Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1, *et seq.*), Executive Order 10450 (18 F. R. 2489), and Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 387, as amended, 5 U. S. C. 863) are set forth in the Appendix, *infra,* pp. 1a–18a.

STATEMENT

Petitioner, who has veteran's status under the Veterans' Preference Act of 1944 (Appendix, *infra,* pp. 17a–18a), held a position in the classified service as a Food and Drug Inspector in the New York District of the Food and Drug Administration in the Department of Health, Education, and Welfare. In that position he did not have access to Government secrets or classified material and was not in a position to influence policy against the interests of the

Government. (R. 10, 40.) In October 1953, petitioner was interviewed by the Chief of Personnel Security of the Department of Health, Education, and Welfare in connection with an investigation regarding his retention in employment under the Government employees security program, a program established by Executive Order 10450 (Appendix, *infra*, pp. 4a–16a).[1] During this interview, petitioner was questioned concerning his attitudes, associations and friends. (R. 3, 37.)

On November 13, 1953, petitioner received a notice of suspension "pending investigation under Executive Order 10450" (R. 3, 38). The Under Secretary of the Department of Health, Education, and Welfare, by letter dated November 25, 1953 (R. 16–18), informed petitioner of the reasons for his suspension and set forth the following written statement of charges (R. 16–17):

> 1. That you established and have continued a close association with individuals reliably reported to be Communists.
>
> 2. That you have maintained a continued and sympathetic association with the

[1] The Preamble of the Order recites that it is based upon the authority vested in the President "by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*) [P. L. 733, 81st Congress], and as President of the United States, * * *" (Appendix, *infra*, p. 5a).

> Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.
>
> 3. That you have, by your own admission, donated funds to the Nature Friends of America.
>
> 4. That you have contributed your services in the form of work to the Nature Friends of America.
>
> 5. That you have attended social gatherings of the Nature Friends of America.

The letter further informed petitioner that he might submit, within thirty days, statements or affidavits refuting or explaining the charges, and that he was entitled to a hearing if he requested one.

On December 23, 1953, petitioner replied to the letter of the Under Secretary, refusing "to make any explanation regarding the associations carried on in my private life" on the following grounds (R. 19):

> * * * I consider any request by the United States Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of "freedom of association."

Petitioner was thereupon informed by the Department, by letter of January 4, 1954, that since it appeared from his letter that he did not desire

a hearing, his case had been forwarded to the Secretary for final disposition and he would be advised of the determination made (R. 20).

On January 15, 1954, the Secretary,[2] after referring to the letter of the Under Secretary, to the statement of charges, to the sections of the Executive Order upon which the charges were based, to petitioner's reply refusing to offer any explanation "regarding the associations carried on in your private life", and to his declared intention to "continue to associate with any persons or groups of persons whom you see fit to choose", advised petitioner that (R. 21):

> Based on a study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954.

On January 27, 1954, petitioner's counsel sought to reopen petitioner's case on the ground that petitioner had been in a "post-operational depression" but now believed he could refute the

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[2] By order of this Court, dated November 21, 1955, Marion B. Folsom, present Secretary of Health, Education, and Welfare, was substituted as a party respondent in the place and stead of Oveta Culp Hobby, resigned (R. 65). References in this brief to the actions taken by the respondent Secretary in this case are to Mrs. Hobby.

charges against him (R. 22, 23). Sworn affidavits were enclosed with the letter (R. 24–26). Petitioner's counsel again wrote the Department on January 29, 1954, stating that if a hearing were granted petitioner would disprove the charges (R. 27). The Secretary advised petitioner's counsel on February 4, 1954, that the request for reopening was denied (R. 28). On February 10, 1954, petitioner's counsel again wrote the Secretary reiterating his previous statements and asserting various procedural and constitutional objections (R. 29–31). On February 24, 1954, the Secretary replied, again declining to reopen the case, stating that petitioner's separation was accomplished in accordance with Executive Order 10450, and that the validity and constitutionality of the Executive Order and the constitutionality of P. L. 733, 81st Congress, were not matters to be determined by that Department (R. 32).

Petitioner appealed his discharge to the Second Civil Service Region of the Civil Service Commission on February 25, 1954, claiming violations of the Veterans' Preference Act and the Civil Service Commission's regulations thereunder. The Civil Service Regional Director declined to accept this appeal, on the ground that the Veterans' Preference Act is not applicable to determinations made pursuant to P. L. 733 and Executive Order 10450. On petitioner's appeal to the Civil Service Commission, this ruling was affirmed (R. 33–36).

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment invalidating his discharge by the Secretary of Health, Education, and Welfare; for similar relief declaring the refusal of the Civil Service Commission to hear petitioner's appeal to be null and void and in violation of the Veterans' Preference Act; and for an order restoring him to his position as a Food and Drug Inspector as of the date of his discharge (R. 2–13).

After the filing of the answer (R. 37–42), petitioner and respondents filed cross-motions for judgment on the pleadings (R. 43, 44). On October 26, 1954, the District Court, holding that the Executive Order validly extended the coverage of P. L. 733 to include petitioner's position, granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (R. 53). The Court of Appeals affirmed, Judge Edgerton dissenting (R. 55–63).

SUMMARY OF ARGUMENT

I

A. 1. Petitioner's primary contention is that the provisions of P. L. 733 apply only to "sensitive" or "policy making" positions in agencies concerned with military matters, foreign relations, and related programs, and hence that the President was not authorized to make its provisions applicable to the Department of Health, Educa-

tion, and Welfare. But P. L. 733 is explicit on this point. In clear and unambiguous language, the Act provides that the head of each department and agency named therein may discharge "any" employee, and that its provisions shall apply to "such other" departments and agencies "as the President may * * * deem necessary." The sole limitation placed upon department heads and upon the President is that, in their discretion, they deem such action "necessary or advisable in the interest of the national security." No mention whatsoever is made in P. L. 733 of "sensitive" or "policy making" positions, nor does the Act define or limit the words "necessary," "advisable," or "national security."

2. Petitioner to the contrary, the legislative history of the Act does not show, consistently and convincingly, that Congress meant other than what it said. While petitioner can extract isolated statements which seemingly support his position, these statements, read in context, were merely descriptive of the immediate impact of the bill and of its intended use under then existing programs. Thus, some spokesmen for the bill referred to "security risks" in terms of access to classified material in "sensitive" agencies. The same spokesmen also pointed out, however, that the bill had been drafted broadly enough to cover loyalty as well as security cases and thus was not limited to employees having access to classified

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material. Significantly, the facts that the bill did not define what a "security risk" was (a term not even employed in the Act), that no distinction was drawn between so-called sensitive employees and other employees, and that the President was authorized to include *all* executive agencies within its provisions, were basic to the opposition of those who objected to the bill because, as drafted, it did not permit an appeal to the Civil Service Commission. On the other hand, supporters of the measure were clearly aware of those factors and approved the bill's treatment of them. In our view, the legislative materials support the validity of Executive Order 10450. But at the very least, the history of the Act is not sufficiently clear and compelling to warrant reading limitations into the Act that were not placed there, in terms, by Congress.

3. Petitioner's argument that, prior to the issuance of Executive Order 10450 in April 1953, various executive officers themselves drew a distinction between "sensitive" and "nonsensitive" positions under P. L. 733 is unfounded. In particular, petitioner places great stress upon a 1952 report of the Interdepartmental Committee on Internal Security. But this report was a policy recommendation and not a legal memorandum. Moreover, the Committee did not unequivocally take a position which conflicts with Executive Order 10450. And, in any event, the

authoritative administrative interpretation of P. L. 733 is the Executive Order itself.

B. Petitioner further argues that Executive Order 10450 is invalid because it divests agency heads of the discretion conferred upon them by P. L. 733. In fact, the Order follows the language of P. L. 733 *in haec verba,* providing for termination whenever the department head deems it "necessary or advisable in the interest of the national security." The Order does provide that department heads should be guided in determining what is "necessary or advisable" by the principle that no person should be employed unless his employment is "clearly consistent with the interests of the national security." But petitioner cannot well argue that this criterion is "more onerous" than that of the statute since the words "necessary or advisable" are not defined in P. L. 733 and are, of course, capable of many applications. At the very least, the President's standard is a permissible one.

As we see it, the real question is not whether the President has adopted a "more onerous" standard but whether he is completely without power to adopt any criterion and to direct his department heads to be guided by that test in exercising their statutory discretion. If Congress had meant to prohibit the President from so acting under P. L. 733, a serious constitutional question would arise, but we agree with the court below that that problem is not here presented.

It must be presumed that Congress knew that subordinate executive officers act under the direction of the President and that it had that principle in mind when it conferred discretion upon those officers. Moreover, even assuming that P. L. 733 does authorize agency heads to disregard the President's regulations in their discretion, the Act plainly does not repeal the power of the President to establish such regulations nor prohibit agency heads from following them.

Finally, Congress has confirmed and ratified the action of the Chief Executive. It deliberately refused all-inclusive dismissal authority to certain department heads because Executive Order 10450 was deemed sufficient; also, appropriations for the enforcement of that Order have continued to be made. Since it is well settled that Congress may ratify acts which it might have authorized and give the force of law to official action unauthorized when taken, the absence of legislative sanction for the Executive Order at the time of its issuance would be immaterial.

C. Petitioner also appears to argue that his removal was invalid as not actually necessary or advisable in the interest of national security. But apart from the general assertion that a loyal person in a non-sensitive position *cannot* be a "security risk", there is no showing here that the Secretary acted on grounds so unrelated to the national security that her action must be termed arbitrary or capricious. Accordingly, the

repeated ruling of the courts that they will not inquire into the merits of an administrative determination of what constitutes cause for discharge is dispositive here. And it is plain that retention of a loyal employee with continued close Communist associations could reasonably be deemed detrimental to the national security even though he had no access to classified data.

II

A. Petitioner's final contention is that his discharge did not comply with a procedural requirement of P. L. 733. The argument is that the provision in section 1 of P. L. 733 that the employee be furnished "a written statement of the decision of the agency head" means a statement of the reasons for the result rather than a statement of the ultimate determination made by the agency head. Here again, petitioner seeks to read something into the Act which Congress did not say, and there is nothing in the legislative history which suggests that Congress intended "decision" to mean "reasons." Petitioner relies on cases arising under the Lloyd-LaFollette and Veterans' Preference Acts. But P. L. 733 expressly makes those statutes inapplicable and their terms are markedly different from those of P. L. 733; those Acts make a clear and unmistakable distinction between the "reasons" for the removal and the "decision" to dismiss, and (unlike P. L. 733) require that both be furnished.

B. Assuming, however, that P. L. 733 requires something more than a mere statement of the determination by the agency head that employment should be terminated, there has been substantial compliance in this case. Fairly read, the Secretary's letter fully advised petitioner of the basis upon which the determination rested. In the light of petitioner's refusal to request a hearing, we think it clear that the Secretary need not give him a more elaborate and detailed statement of the "reasons" for his dismissal than she did.

ARGUMENT

INTRODUCTION

Under Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 387, as amended, 5 U. S. C. 863, Appendix, *infra,* pp. 17a–18a) a "preference eligible" whose discharge is sought is entitled to: (1) thirty days advance written notice, (2) stating the reasons for such proposed action, (3) a reasonable time for answering the same personally and in writing, and (4) a hearing on appeal to the Civil Service Commission from an adverse decision.[3] In the present case, petitioner, a "preference eligible," was given more than thirty days advance notice of his proposed discharge (R. 16–18, 21); he was informed of the

[3] The employee is not entitled to a hearing in the employing agency. *Washington* v. *Summerfield*, C. A. D. C., No. 12664, decided November 23, 1955.

reasons for that action (R. 16–17); he was afforded thirty days in which to answer the charges (R. 18); and, although Section 14 does not so require (see footnote 3, *supra*, p. 14), he was offered a hearing by the Department of Health, Education, and Welfare (R. 18). He was not, however, granted an appeal to the Civil Service Commission from the adverse decision of the Department (R. 33–36).

In these circumstances, if Section 14 applied to petitioner, his discharge was illegal for want of an opportunity to appeal. The Civil Service Commission declined to accept his appeal on the ground that he was not within the purview of Section 14 by virtue of P. L. 733, Eighty-first Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1 *et seq.*, Appendix, *infra*, pp. 1a–4a), as implemented by Executive Order 10450 (18 F. R. 2489, Appendix, *infra*, pp. 4a–16a) (R. 33–36). The ultimate question here presented, therefore, is whether the provisions of P. L. 733 and Executive Order 10450 take away the appeal right granted by Section 14.

Section 1 of P. L. 733 (Appendix, *infra*, pp. 1a–4a) states that "notwithstanding the provisions of section 6 of the [Lloyd-LaFollette Act] (5 U. S. C. 652), or the provisions of any other law," the head of each of eleven named departments and agencies "may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without

pay, any civilian officer or employee," and that, after certain procedural steps have been taken, the agency head concerned may "terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States * * *." The procedural rights granted to non-probationary citizen employees are: (1) a written statement, within thirty days of suspension, of the charges against the employee, stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter to answer the charges; (3) a hearing, at the employee's request, by the agency; (4) a review of his case by the agency head, or some official designated by him, before a final adverse decision is made; and (5) a written statement of the decision of the agency head. No appeal to the Civil Service Commission is provided, and the "determination by the agency head concerned shall be conclusive and final."[4]

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[4] It is apparent from these provisions that, contrary to Judge Edgerton's characterization of the Act, P. L. 733 does not provide for "summary unappealable dismissal" (R. 62). Rather, it is a summary *suspension* statute. With respect to dismissal, P. L. 733 provides substantially the same protection to employees as Section 14 of the Veterans' Preference Act. Both acts provide for a hearing; they differ in that the Veterans' Preference Act grants that hearing on appeal to the Civil Service Commission (see fn. 3, *supra*, p. 14), whereas P. L. 733 grants that hearing within the agency and an appeal to the agency head. It should be further

In the light of these provisions, it seems clear that if petitioner had been employed in one of the eleven departments and agencies enumerated in P. L. 733, Section 14 of the Veterans' Preference Act would not have applied to his discharge. The employing agency here involved, the Department of Health, Education, and Welfare, is not one of those eleven agencies.[5] However, Section 3 of P. L. 733 (Appendix, *infra*, p. 4a) provides that "[t]he provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." And, in Section 1 of Executive Order 10450 (Appendix, *infra*, p. 5a), the President, "deeming such action necessary in the best interests of the national security," ordered that the provisions of P. L. 733 "shall apply to all other departments and agencies of the Government."

It follows that if Executive Order 10450 is a valid exercise of the authority vested in the President by P. L. 733, petitioner was not entitled to appeal his discharge to the Civil Service Com-

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noted that, far from being a summary dismissal statute, P. L. 733 gives non-veteran employees more rights—except with respect to suspension—than they would otherwise have under the Lloyd-LaFollette Act (5 U. S. C. 652), since the latter Act does not provide for any hearing.

[5] The named agencies are the Departments of State, Commerce, Justice, Defense, Army, Navy, Air Force, and Treasury, the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics.

mission under Section 14 of the Veterans' Preference Act, and his dismissal was valid. Petitioner's primary contention is that the President could not validly extend the provisions of P. L. 733 to the Department of Health, Education, and Welfare, and that that Act authorized the President to extend its provisions only to "sensitive" or "policy making positions" in agencies primarily concerned with military matters, foreign relations, and related programs. This issue is discussed in Point I, A, *infra*, pp. 20–42.

The second question raised by petitioner assumes that the President was authorized to make the provisions of P. L. 733 applicable to the Department of Health, Education, and Welfare (thus depriving petitioner of the protection afforded by the Veterans' Preference Act), but argues that the Executive Order is nevertheless invalid because it unlawfully divests department and agency heads of the discretion vested in them by P. L. 733. On this score, petitioner's position is that, while P. L. 733 authorizes an agency head to discharge an employee whenever he shall determine such termination "necessary or advisable in the interest of the national security of the United States," the Executive Order supposedly prescribes a more rigid test of suitability by requiring the discharge of any employee whose retention is not "clearly consistent with the interests of the national security." We discuss this second issue in Point I, B, *infra*, pp. 42–62.

The third question assumes that Executive Order 10450 is fully valid but urges that petitioner's dismissal was unlawful because the notice of dismissal failed to set forth the reasons for the Secretary's determination that his employment should be terminated; petitioner's contention is that Section 1 of P. L. 733, providing that the employee be furnished "a written statement of the decision of the agency head", requires a specific statement of the reasons for the result rather than a statement of the ultimate determination made by the agency head. This last issue is discussed in Point II, *infra*, pp. 66–74.[6]

As petitioner recognizes (Pet. 22), this case does not involve the issues "of confrontation and cross-examination" which were before this Court in *Bailey* v. *Richardson*, 341 U. S. 918, and *Peters*

[6] In the Court of Appeals, respondents argued that petitioner failed to exhaust his administrative remedy and that this action must therefore fail. The court below held that this point is not well taken, stating that while petitioner failed to pursue the administrative remedy offered him, nevertheless the administrative process was exhausted and a final administrative decision was reached and rendered (R. 56). In our view, this ruling, in the form stated by the court, does violence to a fundamental postulate of the exhaustion doctrine, namely, that participation in, and exhaustion of, an administrative remedy may obviate the need for any judicial determination or may render more precise the scope of decision necessary. Cf. *Aircraft & Diesel Corp.* v. *Hirsh*, 331 U. S. 752, 772–773. We do not now, however, urge this point as an independent ground for affirmance, because, if petitioner is correct in the merits of his claim, he was entitled to the appeal to the Civil Service Commission which was denied him.

v. Hobby, 349 U. S. 331. Since petitioner rejected the Departmental hearing offered to him (see Statement, *supra*, pp. 5–6; *infra*, pp. 71–73), no questions are or can be presented as to hearing procedure or conduct, or as to the proof which might have been adduced at such a hearing.

I

EXECUTIVE ORDER 10450 IS VALID AS APPLIED TO PETITIONER

A. P. L. 733 AUTHORIZES THE PRESIDENT TO MAKE ITS PROVISIONS APPLICABLE TO THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND HIS DETERMINATION IS NOT SUBJECT TO JUDICIAL SCRUTINY

1. *The language of P. L. 733.*—Based upon his reading of the legislative and other materials, petitioner argues that the provisions of P. L. 733 apply only to "sensitive" or "policy making" positions in agencies concerned with military matters, foreign relations, and related programs (Pet. Br. 12–34). "The trouble with the argument," as the court below pointed out, "is that the statute itself is explicit on the point" (R. 57). Its coverage is not restricted either to "sensitive" positions or to a special class of agencies.

(a). As to the employee-positions covered by the Act, Section 1 of P. L. 733 expressly states, in the broadest possible terms, that the head of each of the eleven named departments and agencies (see fn. 5, *supra*, p. 17) may suspend "*any* civilian officer or employee" and terminate the employment of "*such* suspended civilian officer or em-

ployee" whenever he shall determine such suspension or termination necessary or advisable in the interest of the national security [emphasis added]. To read this language as applying solely to employees occupying "sensitive" or "policy making" positions is wholly to disregard the all-inclusive word "any", particularly so since no mention whatsoever is made in P. L. 733 of "sensitive" or "policy making" positions. Cf. *Ex parte Collett*, 337 U. S. 55, 58.

Petitioner argues, however, that the provision relating to "*any* civilian officer or employee" is necessarily qualified by the requirement that the termination must be "necessary or advisable in the interest of the national security" (Pet. Br. 15, 16, 23). Contending that the term "national security"—which is not defined in the Act—is similar to phrases such as "national defense" which appear in the context of other statutes, petitioner asserts that the meaning judicially ascribed to these other phrases demonstrates that the term "national security" has reference only to the safety of the nation and that P. L. 733 does not, therefore, cover "non-sensitive" and "non-policy making" employees (Pet. Br. 27, 29).

But this argument proceeds from the mistaken premise that P. L. 733 was intended to incorporate some external and judicial standard of "national security." The Act is not limited to those situations where termination *is* demonstrably (or can judicially be shown to be) "necessary or

advisable in the interest of the national security." Rather, P. L. 733 declares that an agency head may terminate the employment of "any civilian officer or employee * * * whenever *he* shall determine such termination necessary or advisable in the interest of the national security." (Emphasis added.) The scope of the agency head's power is not, therefore, circumscribed by some judicial test of "national security" but encompasses all cases within the agency head's own understanding of what may be "necessary or advisable in the interest of the national security." Significantly, P. L. 733 does not limit the words "necessary," "advisable," or "national security," but leaves the matter to the judgment of the agency head. Further, Section 1 provides that the agency head's determination that termination is "necessary or advisable" shall be "conclusive and final." It follows, therefore, that the agency head is not precluded by the terms of the Act from deciding that the retention of the occupant of a "non-sensitive" post could be adverse to the national security.

(b). Similarly, Section 3 of the Act puts the selection of the agencies to be affected solely in the hands of the President. Like Section 1, Section 3 does not say anything about "sensitiveness" or "policy making"; nor does it say that the provisions of the Act shall apply only to such other agencies as may judicially be determined to be necessary in the best interests of national

security. In this respect, also, the scope of the Act is committed to executive discretion. It explicitly declares that (Section 3, Appendix, *infra*, p. 4a) "the provisions of this Act shall apply to such other departments and agencies of the Government *as the President may*, from time to time, *deem necessary* in the best interests of national security." (Emphasis added.)

This unambiguous statutory language leaves little room for controversy. In his discretion, the President can, under Section 3, make P. L. 733 applicable to such other departments as *he* deems necessary. The determination is his alone, and the courts are not to oversee or revise his decision. Judicial scrutiny of the exercise of discretion vested by Congress in the President personally would be rare in any case, but the principle of abstention becomes absolute where the factors influencing the President's judgment lie in the realm of political and foreign affairs. Cf. *Chicago & Southern Airlines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *Ludecke* v. *Watkins*, 335 U. S. 160; *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

2. *The legislative history.*—In the face of the precise language of P. L. 733, petitioner argues that this Court should nevertheless read limitations into the Act that were not placed there by Congress. Petitioner asserts that Congress did not intend to confer such broad authority upon the

President and agency heads, and that the legislative history of P. L. 733 shows consistently and convincingly that Congress never intended the Act to apply to employees such as petitioner. As we read the legislative history, it does not lead persuasively to petitioner's conclusion that Congress did not mean what it said. Cf. *Unexcelled Chemical Corp.* v. *United States,* 345 U. S. 59, 64; *United States* v. *Lindsay,* 346 U. S. 568, 570.

Admittedly, petitioner can extract isolated statements from the hearings, reports and debates which seemingly support his position (Pet. Br. 17, 19–26, 38–39). But these statements must be read in context and viewed in the light of other statements to the contrary. Thus, it is true, as petitioner points out, that Mr. Larkin, one of the spokesmen for the Department of Defense, defined a "security risk" in terms of access to classified material in a "sensitive" agency. This restricted view, however, was not unanimously held nor was it consistently taken. Moreover, it is by no means clear that these and similar statements had reference to the scope of the full authority proposed to be conferred upon the Executive branch by the bill. Rather, they were merely descriptive of the immediate impact of the bill and of its intended use by the Defense Department in connection with then existing programs.

For example, the Committee Reports stated that the bill did not deal with the removal of

disloyal employees but was concerned with loyal employees who are "security risks." See H. Rep. No. 2330, 81st Cong., 2d sess., p. 4; S. Rep. No. 2158, 81st Cong., 2d sess., p. 2. It does not follow from these statements, however, that the bill did not authorize the dismissal of disloyal employees as "security risks." To the contrary, the Defense Department, which authored the bill (Hearings before the House Committee on Post Office and Civil Service, 81st Cong., 2d sess., on H. R. 7439, pp. 2, 3), expressly advised the Congress that disloyal persons would be handled pursuant to Executive Order 9835 (12 F. R. 1935)—establishing the then federal employees' loyalty program—only so long as that Order was in effect. See House Hearings, *supra*, pp. 4, 59; H. Rep., *supra*, p. 6; S. Rep., *supra*, p. 4. That Department pointed out that, prior to Executive Order 9835, it had handled loyalty and security cases together under P. L. 808, 77th Congress (Act of December 17, 1942, 56 Stat. 1053), which authorized dismissals warranted by "the demands of national security." See House Hearings, *supra*, pp. 29, 64.[7] The Department of the Army stated that, even after the issuance of Executive Order 9835, it used P. L. 808 exclusively and drew no distinction between loyalty and security cases. See House Hearings, *supra*,

[7] The Act of December 17, 1942, was repealed by P. L. 733 (see Appendix, *infra*, p. 4a).

pp. 28–29, 34; cf. *Deak* v. *Pace*, 185 F. 2d 997 (C. A. D. C.). And, commenting on the statement in the House Report that the bill did not deal with the dismissal of disloyal employees, Mr. Larkin observed that "technically and legally it is broad enough to do so." See Hearings before the Senate Committee on Armed Services, 81st Cong., 2d sess., on H. R. 7439, p. 6. He reiterated that the authority provided in the bill "is broad enough to handle a loyalty case and a security case. While the President's loyalty program is in effect, continues in effect now, we would, of course, adhere to the procedures in the President's loyalty program for a loyalty case." *Ibid;* see also 96 Cong. Rec. 10025, 10027.

This testimony obviously qualifies Mr. Larkin's casual use of the phrase "security risk" solely in terms of access to classified information. Since, as the Committee reports noted (H. Rep., *supra*, p. 4; S. Rep., *supra*, p. 2), it was generally agreed that a disloyal employee is an aggravated "security risk" and should not be employed anywhere (even in a "non-sensitive" place) and since, as the Defense Department specifically pointed out, the bill had been deliberately and broadly drawn to cover loyalty cases if necessary, it is apparent that Congress used the all-inclusive term "*any* civilian officer or employee" as necessarily including *all* employees irrespective of whether their positions were "sensitive" or "policy making." In this light, Mr. Larkin's oral

definition of "security risk"—on which petitioner relies—must be understood as referring only to the use that would be made of the proposed Act by the Defense Department under then existing programs, rather than to the full scope of the dismissal power which would be conferred by the Act.[8]

In this connection, it is not without significance that the Committee made no mention of Mr. Larkin's testimony on this score in their reports. Instead, the House Committee quoted Under Secretary of the Navy Kimball's broader use of the phrase "security risk" as not limited to employees having access to classified material; Mr. Kimball stated generally that a Defense Department employee "may be a serious security risk due to his associations, affiliations, habits, or indiscreetness." See H. Rep., *supra*, p. 3; see also House Hearings, *supra* at 72–73 (quoted in Pet. Br. 26, n. 13); 96 Cong. Rec. 10021, 10024, 10028.[9]

[8] Petitioner asserts that Defense Department witnesses testified that that Department "had by its own security regulations distinguished between sensitive and non-sensitive jobs" (Pet. Br. 25). This assertion is not borne out by the Air Force regulations, which were the only regulations inserted into the record. See House Hearings, *supra* at 75, 76–86. Those regulations listed the extent of the employee's access to classified information as only one of several independent factors in the security evaluation. *Id.* at 76, 79.

[9] It is also not without significance, in view of petitioner's insistence that "security risk" relates only to persons with policy positions or access to classified material, that several persons objected that the bill did not define what a "security risk" was. Thus, Congressman Miller pointed out during the

Similarly, the statements in the Committee Reports to the effect that the bill dealt with "security risks" in "sensitive" agencies and that the bill made provision for the reemployment of such employees in "non-sensitive" agencies do not necessarily mean that Congress forbade the provisions of the Act from being extended by the President to all the departments and agencies. These statements merely described the immediate effect of the legislation, *i. e.*, that it was of immediate applicability only to eleven named "sensitive" agencies. Indeed, the fact that the President could extend the provisions of the bill "to any department or agency when, in his opinion, the national security requires it" (S. Rep., *supra*, p. 3; see also H. Rep., *supra*, p. 2) was an important factor in the opposition of those who objected to the bill because it did not permit an appeal to the Civil Service Commission.

During the debates in the House, several amendments were offered to provide for some form of independent review. The amendments were rejected. In explanation of his amendment,

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hearings that the bill contained no definition of "security risk." See House Hearings, *supra*, p. 50. Similar observations were made by Congressmen Holifield, Gross and McCarthy on the floor of the House. See 96 Cong. Rec. 10021, 10024, 10028, 10031. And representatives of employees' organizations and the American Civil Liberties Union protested that the bill's lack of definition in this respect left the scope of its application too much to executive discretion. See House Hearings, *supra*, pp. 42, 43, 49, 50, 54.

Congressman Holifield called the House's attention explicitly to the unequivocal language of the bill authorizing the summary suspension and dismissal of *any* employee in *any* department or agency, and argued that these provisions necessitated affording employees protection against arbitrary dismissals. Mr. Holifield stated (96 Cong. Rec. 10023–10024):

> *In section 3 of the bill the President is given authority to include, in the terms of this act, all executive agencies. So this applies potentially to every executive agency, not only the sensitive ones.* We must keep that in mind in the first place.
>
> *In the second place, there is no distinction made in the bill between so-called sensitive employees, that is, employees who have access to confidential and secret information, and the regular employees.* In many instances 75 or 80 percent of the department's employees, those in clerical position and those running elevators and doing janitor work and manual work are not what would be called sensitive employees and are not in positions where they could be security risks.
>
> *Passage of this bill would obviate the necessity of using the loyalty procedure and any department of the Government could dismiss any employee if the agency head or his subordinates want to.* That is the same procedure which the Army has been using and which the gentleman from

California [Mr. Miller] just finished condemning. The Navy and the Air Force are using the loyalty procedure method giving the employee the right to appeal for a hearing before an independent board. The Army has not; the Army has been dismissing its employees, making no charges, but just summarily dismissing them. Such persons could be reemployed in other agencies of the Government.

Finally, the reason my amendment goes further than the Miller amendment and makes it mandatory for the head of an agency to accept the appeal board's decision is because we are dealing in very indefinite terms. *The term "security risk" has no definition. It is so vague and fuzzy that any Federal employee's job can be jeopardized. Because the reasons for dismissal are not defined clearly, we should be more anxious than ever to protect the employee from arbitrary and discriminatory actions. The Under Secretary said it might be according to a man's associations, to his affiliations; to his habits, or because he was indiscreet.* So because we are going so much further and entering into a field which goes far beyond loyalty or disloyalty, I say that the amendment should go beyond that and that the employee should be given the protection of an independent review board. That is why my amendment is offered in the terms of a substitute. [Emphasis added.]

The broad scope of the President's power under the bill was also pointed out during the Senate Hearings. The question was initially raised by Senator Chapman, who asked Mr. Larkin to tell the Committee which federal agency he thought ought not to be classified as a "sensitive" agency. The following exchange then occurred (Senate Hearings, *supra*, pp. 15, 16, 17):

> Mr. LARKIN. The Federal agencies which do not have classified material. A lot of Federal agencies hire droves of laborers, they do not have access to classified material at all.
>
> Senator BYRD. *Section 3 gives the President the right to classify every agency as a sensitive agency.*
>
> Mr. LARKIN. *That is right.*
>
> Senator BYRD. *He could take the whole Government. This bill refers to about a million employees. We have 2,000,000. He could put the other 1,000,000 in.*
>
> Senator CHAPMAN. I do not see why the whole Government is not sensitive as far as that is concerned. [Emphasis added.]
>
> * * * * *
>
> Senator BYRD. I want to ask about section 3. Does the President have to give his reasons for including other agencies as sensitive agencies or just say that they should be?
>
> Mr. LARKIN. I think he would have to make a finding that he deems it necessary in the best interests of national security that

Department X now have this power because of the sensitive character of the work they are now doing.

Senator BYRD. In other words, he just declares it to be so and does not have to give any reasons?

Mr. LARKIN. No, sir.

Senator BYRD. Was this in the legislation we passed in the 80th Congress?

Mr. LARKIN. Yes, sir.

Senator BYRD. This same clause?

Mr. LARKIN. Yes, sir.

Senator BRIDGES. Don't you think he should give some reason when he makes the change, that he should make a finding?

The CHAIRMAN. Mr. Larkin, let me interpose and ask Senator Bridges and you both this question: *If we want to get these subversives out of Government and we want to get these security risks out of Government and we designated only a part of the governmental agencies here where the regulations we put up apply, why shouldn't we give the President the power to get them out of all branches of the Government?* Why leave a part of it where he cannot act at all? It seems to me we should put them all in or give the President the right to put them all in. We do not want to do a 50 percent job on these fellows.

Mr. LARKIN. *We have delineated here what is generally regarded as the sensitive agencies that need that authority at this time. If there are others that become sensitive, the President can at that time give*

them the power. In the event they do not become sensitive or are not sensitive, there is no need for the power. [Emphasis added.]

* * * * *

The CHAIRMAN. I think without this provision in here we are now discussing, to take an extreme case—it may sound a bit hysterical—you could take a man in the Park Service that has charge of great forests. There is nothing more important to the war effort than timber. He is a questionable fellow, a risk. He could do a great deal of damage to the timber reserves of the country. You might want to let him go. *So I think, therefore, that you have got to either put every branch of the Government in here alike or you have got to give the President the authority to put them in whenever it appears wise so to do.*

Mr. LARKIN. *We have felt that that latter is the better way to do it.* This power should not be granted willy-nilly. [Emphasis added.]

* * * * *

Senator Chapman then asked Mr. Larkin what objection, if any, he would have to making the bill apply to all agencies. Senator Bridges interjected that he personally had no objection, and Senator Hunt suggested that Section 3 be amended to say "[t]he provisions of this act shall apply to all other departments—period." Senate Hearings, *supra*, p. 17. Mr. Larkin replied that "I

think it is unnecessary. I do not know how the Bureau of the Budget and the President feel about it. We left it so that if the need arises it can be taken care of without further legislation. * * *" *Ibid.*

Subsequently, Senator Morse stated that he agreed "it ought to cover all of them. If your procedure is fair, I see no reason why a bad security risk should be in any department or a person that meets the qualifications of the type of persons Senator Bridges is talking about." Senate Hearings, *supra,* p. 19. He objected, however, to the lack of any provision in the bill for an appeal to some independent body. Senate Hearings, *supra,* pp. 19–24.

Senator Hunt's amendment to Section 3—making the bill apply to all departments—was then put to a vote. Again, Mr. Larkin stated that he believed the amendment to be unnecessary. The Committee was evenly divided, and the amendment was not carried. Senate Hearings, *supra,* pp. 25–26. In explanation of his vote, Senator Morse stated "that although I want to see such persons as we are trying to eliminate from Government employment eliminated from all departments, I could not vote for the amendment until I thought there was a proper procedure in there that would check arbitrary action on the part of dismissing officers." *Id.* at 26.

At a subsequent meeting of the Committee, Senator Saltonstall offered an amendment (Sen-

ate Hearings, *supra*, pp. 33–40) "that goes a long way toward what Senator Morse is arguing about" (*id.* at 39). The amendment, which was accepted by the Committee (*id.* at 40) and ultimately adopted by Congress (96 Cong. Rec. 12048–12049, 12569), changed the reemployment proviso of Section 1 so as to authorize the Civil Service Commission to determine at the written request of the terminated employee whether he is eligible for employment by any other agency or department of the Government (Senate Hearings, *supra*, at 39).

If any conclusion is to be drawn from this legislative history, we believe that the materials support the validity of Executive Order 10450, in that the view was strongly expressed and reiterated that the President could extend the Act to all agencies and departments. See also *infra*, pp. 57–61. At the very least, the legislative history is not so consistent and compelling as to warrant reading into the language of the Act limitations which are inherently precluded by those terms. The only comfort that petitioner can draw from the Congressional materials is that Congress did contemplate that an employee who was discharged under the Act for security reasons from one department might be able to obtain employment in a different department. That is not to say, however, as we have shown, that Congress did not intend to authorize the President to extend the provisions of the Act to all the departments and

agencies. The Congressional purpose to preserve employee reemployment rights could be, and in fact has been, given effect even though all departments and agencies are covered by the Act. Thus, Section 7 of the Executive Order (Appendix, *infra*, pp. 8a–9a) provides, in accord with Section 1 of P. L. 733, that a dismissed employee may be employed by another department or agency after a determination by the Civil Service Commission that he is eligible for such employment and a finding by the head of the department that reemployment is clearly consistent with the interests of the national security. See also 5 C. F. R. (1955 Supp.) 9.108.[10]

3. *Post-enactment executive action.*—Seeking to buttress his reading of P. L. 733, petitioner contends that, prior to the issuance of Executive Order 10450 in April 1953, various executive officers themselves drew the distinction he advances here between "sensitive" and "non-sensitive" positions (Pet. Br. 25–28, 39, 45). Petitioner's view of these other executive interpretations is unfounded. But even if it were true, the

[10] According to the records of the Civil Service Commission for the period May 27, 1953 through December 17, 1955, seventy-six employees who were dismissed under the procedure established by P. L. 733 and the Executive Order requested clearance for reemployment from the Commission. Favorable decisions were rendered in fifteen cases and adverse decisions in forty cases. Twenty-one cases were closed without action, because the employee withdrew his application or was rehired.

authoritative administrative interpretation of P. L. 733 would be Executive Order 10450 itself.

Petitioner first cites Section 3 (a) of the 1951 Defense Department regulations, as quoted in Bontecou, The *Federal Loyalty-Security Program* (1953 ed.) p. 349, and asserts that that section authorized the termination of an employee, cleared on loyalty grounds, only where the employee held a "sensitive" position in the Department (Pet. Br. 25–26). To begin with, Section 3 (a) of those regulations dealt with suspension and not with termination. The standard for termination was set forth in Section 4 of the regulations and was simply that, "on all the evidence, reasonable grounds exist for belief that this termination is necessary or advisable in the interest of the National security." *See Bontecou, op. cit., supra.* Further, Section 3 (a) of the regulations did not even use the word "sensitive." It authorized suspension where an employee's retention in duty "would jeopardize the security of the activity *or* of classified material, which in turn affects the National security." (Emphasis added.) See Bontecou, *op. cit., supra.* Accordingly, even the suspension provision of the Defense Department regulations was not limited to employees having access to classified information, and the criterion for dismissal did not refer to "sensitivity" or to classified material.

Similarly, while the 1951 regulations of the State Department also referred to employees who

have access to classified information, those rules, too, were not limited in scope to such employees. Entirely apart from the category of employees with access to classified information, Sections 393.2 and 393.3 of the regulations defined a security risk as including an employee who is a member of, affiliated with, or in sympathetic association with an organization on the Attorney General's list—a basic charge against petitioner in the instant case. See Bontecou, *op. cit., supra,* at 326–327.

Petitioner also quotes Miss Bontecou's understanding of the operation of the various loyalty-security programs prior to Executive Order 10450 as supporting the distinction between "sensitive" and "non-sensitive" positions (Pet. Br. 28–29). But petitioner omits the very important qualifying sentence preceding his excerpt, *i. e.*, "*In theory* the two issues [loyalty and security] are quite different." See Bontecou, *op. cit., supra,* at 48. (Emphasis added.) And petitioner also omits Miss Bontecou's later observation that "[o]ne can only conclude that the practice has blurred, if it has not wiped out, the distinction between the two issues." *Id.* at 51.

Petitioner likewise places great stress upon a White House press release (No. 3326, Aug. 8, 1952) which includes a document captioned "A Report By The Interdepartmental Committee On Internal Security On The Government Employee Security Program" (Pet. Br. 27, 33, 62–66). In

particular, petitioner points to pages 13–16 of the Report, which express the opinion of the authors that the authority granted by P. L. 733 should be applied only to employees occupying "sensitive" positions in agencies concerned with the ability of the country to protect and defend itself against hostile or destructive action. But this Report cannot be deemed a definitive interpretation of the scope of P. L. 733 on the part of the Executive branch. Although some members of the Interdepartmental Committee were attorneys, the Committee as a whole was concerned with the coordination of the administration of the various loyalty-security programs rather than with questions of law. The Report discloses that it comprised a number of policy recommendations to the President and was not a legal memorandum. To the extent that the Committee did express the legal opinion petitioner ascribes to it, that opinion was, of course, overridden by the President's legal advisers in the drafting of Executive Order 10450.

Moreover, it cannot be said that the Committee unequivocally took a position which conflicts with Executive Order 10450. Thus, immediately following the passages cited by petitioner, the Report states that (p. 16):

> Desirable uniformity among departments and agencies with employee security programs can best be achieved if these programs are all based upon the same legal authority. At the present time there are

> many different provisions of law which can be construed to form the basis for employee security programs in various departments and agencies. The most significant of these is Public Law 733, 81st Congress, which authorizes suspensions and removals "in the interest of national security."

Continuing, the Committee declared that (p. 17):

> The Committee believes that those agencies which have need of an employee security program should each have the same basic legal authority upon which to establish such a program. This is the best way to assure such uniformity in the administration of the programs as may be desirable.
>
> With respect to employees, Public Law 733 contains the necessary elements for a personnel security program which can protect the legitimate interests of the national security and at the same time guarantee certain basic rights to employees.

Finally, in its transmittal memorandum of April 29, 1952, to the National Security Council Representative On Internal Security, the Committee recommended (White House release No. 3326, Transmittal Memorandum, p. 2) that "a detailed study should be made of these three programs looking toward evolving a single general program to cover eligibility for employment in the Federal Service, whether on grounds of loyalty, security, or suitability."

In accord with this final recommendation, President Truman announced, in releasing the Report on August 8, 1952 (White House release No. 3326, Letter to Chairman of Civil Service Commission, p. 1), that "I have concluded that the most desirable action at this time would be to merge the loyalty, security, and suitability programs, thus eliminating the overlapping, duplication, and confusion which apparently now exist. * * * Accordingly, I should like for the Civil Service Commission to take the necessary steps to provide me with a plan for combining the three existing programs into one at the earliest practicable date."

In January 1953, while the Civil Service Commission was still formulating a new program in response to President Truman's request, the present Administration came into office. The new Administration made its own reappraisal of the problem and concluded, as President Eisenhower stated in his State of the Union Address (H. Doc. No. 75, 83d Cong., 1st sess., p. 9), "that the powers of the executive branch under existing law are sufficient" to initiate "effective programs of security" with respect to the personnel of "all executive departments and agencies." Finding that "the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good con-

duct and character, and of complete and unswerving loyalty to the United States" and that "equitable treatment * * * requires that all persons * * * employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures" (Preamble of Executive Order 10450, Appendix, *infra*, pp. 4a–5a), the President issued Executive Order 10450, extending the provisions of P. L. 733 to all departments and agencies.

B. EXECUTIVE ORDER 10450 DOES NOT UNLAWFULLY DIVEST AGENCY HEADS OF THE DISCRETION VESTED IN THEM BY P. L. 733

Petitioner further argues that, assuming that P. L. 733 authorizes the President to extend its provisions to a Department such as Health, Education and Welfare, Executive Order 10450 is nevertheless invalid because it divests agency heads of the discretion conferred upon them by P. L. 733. The thesis is that the Order conflicts with the Act in that the former supposedly provides that the agency head *"shall"* deny employment if it is not *"clearly consistent with the interests of the national security,"* while the latter provides that the agency head *"may"* deny employment if he deems it *"necessary or advisable in the interest of the national security."* (Pet. Br. 35–47.) The point is without merit for several reasons.

1. *In accordance with P. L. 733, Executive Order 10450 provides for dismissal only where the agency head determines that termination is "necessary or advisable in the interests of the national security."*—Except for Section 7 of Executive Order 10450, petitioner misreads the Order. That Section (Appendix, *infra*, pp. 8a–9a) provides that any person whose employment is terminated under P. L. 733 "shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security * * *." Since P. L. 733 states that a terminated employee "may, in the discretion of the agency head concerned, be reinstated or restored to duty * * *," it is arguable that Section 7 of the Order is in conflict with the Act. But see *infra*, pp. 48–61. Assuming *arguendo* that there is a conflict, however, it is irrelevant in this case. There is no allegation here that petitioner was denied reinstatement or reemployment because of a determination made under Section 7 of the Order. The issue here is not what the Secretary or some other agency head might have done if petitioner had applied for reemployment, or the validity of the Secretary's actions in other cases where such

application was made, but whether the original termination of petitioner's employment is valid."

With respect to termination, involved here, the Order follows the language of P. L. 733, stating *in haec verba* (Section 6, Appendix, *infra*, p. 8a) that should information develop indicating that employment of any employee may not be clearly consistent with the interests of the national security, the agency head "shall immediately suspend the employmnt of the person involved *if he deems such suspension necessary in the interests of the national security* and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee *whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950* [P. L. 733]." [Emphasis added.]

The only verbal difference between Section 6 of the Executive Order and P. L. 733 is that the Act provides that an agency head "*may*" terminate employment "whenever he shall determine

[11] Compare *Yakus* v. *United States*, 321 U. S. 414, 434: "* * * we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided."

such termination necessary or advisable in the interest of the national security of the United States" while the Order states that the agency head "*shall*" terminate employment whenever the same determination is made. "May" and "shall" are often used interchangeably, but even putting that aside, an objection based upon such a difference in phraseology is more theoretical than real. It is highly improbable, if not inconceivable, that the head of a department or agency would determine that an employee's dismissal was "necessary or advisable in the interest of national security" and then fail to exercise the dismissal power conferred by the Act, especially since the sole purpose of making such a determination is to exercise that power. The authority granted by Congress is not the discretion to retain "security risks" but the authority to dismiss those persons whom the agency head in his discretion determines to be "security risks," and that discretion is reiterated, not destroyed, in the Executive Order.

2. *The Executive Order does not prescribe a more onerous standard of judgment than that provided in P. L. 733.*—A further objection is predicated on the declaration in the Executive Order that agency heads shall be guided, in determining whether termination is "necessary or advisable in the interest of the national security", by the principle that no person should be employed unless his retention is "clearly consistent with the

interests of the national security.'"[12] Petitioner

[12] Section 2 of the Order (Appendix, *infra*, pp. 5a–6a) states that each agency head "shall be responsible for establishing and maintaining within his department or ageney an effective program to insure that the employment and retention in employment of any civilian officer or employee * * * is clearly consistent with the interests of the national security." Section 3 (a) (Appendix, *infra*, p. 6a) states that should information develop indicating that the employment of any such person "may not be clearly consistent with the interests of the national security," such investigations shall be made as shall be sufficient to enable the agency head to determine whether retention of such person "is clearly consistent with the interests of the national security." Section 4 (Appendix, *infra*, p. 7a) directs the readjudication of the cases of all employees "in accordance with the said act of August 26, 1950 [P. L. 733]" as have not been adjudicated "under a security standard commensurate with that established under this order." Section 5 (Appendix, *infra*, p. 8a) states that whenever any department or agency receives information that retention of any employee "may not be clearly consistent with the interests of the national security," such information shall be forwarded to the head of the employing agency for review and adjudication "in accordance with the said act of August 26, 1950 [P. L. 733]." Section 6, as noted above, pp. 44–45, provides that when information indicates that employment of any employee "may not be clearly consistent with the interests of the national security," the agency head shall suspend and terminate such person's employment whenever he deems it "necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950 [P. L. 733]." Section 7, as noted above, pp. 43–44, provides that terminated employees shall not be reinstated or reemployed unless the agency head concerned finds it to be "clearly consistent with the interests of the national security." Section 8 (Appendix, *infra*, pp. 9a–12a) declares that investigations conducted pursuant to the Order shall be designed to develop information as to whether the employment of the person concerned "is clearly consistent with the interests of the national security."

contends that the Order thus prescribes a "more onerous" standard of judgment than that provided by Congress in P. L. 733 (Pet. Br. 44–47). But this contention presupposes a non-existent premise—the premise that the words "necessary or advisable in the interest of the national security" have a particular and fixed meaning. As we pointed out earlier, *supra*, pp. 20–23, those words are not defined in P. L. 733 and determination of what is "necessary or advisable" is committed to the discretion of the agency head concerned.

The standard prescribed by P. L. 733 is, therefore, theoretically capable of many applications.[18] It may be that the standard adopted by the Executive Order is more stringent than that which a particular agency head might have adopted; on the other hand, it is possible that the President's standard gives employees greater protection than the test which a particular agency head might have adopted. Accordingly, petitioner cannot

[18] In this connection, it should be observed that the lack of a definition in P. L. 733 does not render the Act invalid as an improper delegation of legislative power. Without venturing into the intricacies of executive-legislative relationship with respect to executive employees, we think it sufficient to point out that the Constitution vests primary responsibility over the selection and tenure of employees in the Executive branch. Accordingly, when Congress enacts a statute which broadly confirms that responsibility—particularly in the area of national security—it is in no sense abdicating a legislative function. Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; see also *infra*, pp. 48–65.

well argue that the criterion contained in the Order is "more onerous" than that of the statute. At the very least, the President's standard (*i. e.*, "clearly consistent with the interests of the national security") is a permissible interpretation of what is "necessary or advisable in the interest of the national security." To quote the court below (R. 58), "the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute * * *." [14]

3. P. L. 733 does not purport to divest the President of his constitutional and statutory

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[14] Petitioner also argues that since the President's standard applies to all employees, the Order precludes the exercise of any discretion on the part of the agency head in applying the definition to sensitive and non-sensitive jobs (Pet. Br. 35–37). This contention is footless. Sections 3 and 8 (a) of the Order (Appendix, *infra*, pp. 6a–7a, 9a–11a) clearly recognize that the nature of the position is one factor which may be taken into consideration in determining whether an employee's retention is clearly consistent with the interests of national security. Similarly, Sections 2 and 3 of the regulations of the Department of Health, Education, and Welfare provide that that factor is to be considered—depending on the nature of the derogatory information—in determining whether continued employment is clearly consistent with the interests of national security. See Bureau of National Affairs, *Government Security and Loyalty*, pp. 15 : 561–15 : 563. See also *infra*, p. 61, n. 22.

power to guide his subordinates in the construction and administration of that Act.—As we see it, the real question before the Court is not whether the President has adopted a "more onerous" standard of what is "necessary or advisable in the interest of the national security", but whether the President is completely without power to adopt any criterion and to direct his agency and department heads to be guided by that test in exercising their statutory discretion, in order that "all persons * * * employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures" (Preamble of Executive Order 10450, Appendix, *infra*, pp. 4a–5a). The answer to this inquiry was succinctly given by the court below (R. 58–59):

> * * * In the first place, this is an executive matter and, if Congress had meant to prohibit the President from acting in respect to it, a serious question as to the validity of its act would arise. As we have already said, the Constitution vests the executive power in the President. In the second place, Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the

enactment. In the third place, Cole's argument in its ultimate essence is that the action of the agency head in the case at bar was void; thus the argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a superior. That position is untenable on its face. The President surely has the right to lay down the lines within which his subordinates shall exercise discretions confided in them, and their operation within such lines is valid, not void. Perhaps, if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here.

(a). This answer, we submit, is inescapable "The Constitution confers on the President the 'executive Power', Art II, § 1, cl. 1, and imposes on him the duty to 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Ex parte Quirin,* 317 U. S. 1, 26. "But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any

express limitation respecting removals,"[15] that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers* v. *United States*, 272 U.S. 52, 117.

It is obvious, moreover, that the President can not always adequately discharge his constitutional duty merely by removing *post facto* an officer who has not intelligently or wisely exercised the powers vested in him. The duty to "'take Care that the Laws be faithfully executed'" may require the President to guide his subordinates in the performance of their functions. The same conclusion is implicit in the constitutional provision that the heads of the executive departments are subject to being called upon by the President for their "Opinion, in writing, * * * upon any Subject relating to the Duties of their respective Offices" (Art. II, § 2), a requirement which indicates that each agency head is, as to the duties of his office, always subject to the President's control.

Admittedly, "[t]he degree of guidance in the discharge of their duties that the President may

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[15] Unlike "the grant of legislative power under Article 1 to Congress, which is limited to powers therein enumerated, * * * the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed * * *." *Myers* v. *United States*, 272 U. S. 52, 128 and at 118, 138.

exercise over executive officers varies with the character of their services as prescribed in the law under which they act." *Myers* v. *United States, supra,* at 132. Where the governing law enjoins a duty of a mere ministerial character, the President cannot forbid its execution. Cf. *Kendall* v. *United States,* 12 Pet. 524, 610–613. But where the duties of officers prescribed by statute are executive, the President "may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers* v. *United States, supra* at 135. And where the duties performed by his cabinet officers are those in which they act for him as his *alter ego*—the field "sometimes described as political" (*id.* at 132)—they "must do his will" since "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it." *Id.* at 134. "In such cases they are exercising not their own but his discretion." *Id.* at 132.

In *Myers,* this Court held that Congress could not constitutionally restrict the President in the exercise of his "exclusive and illimitable power of removal" of "purely executive officers." *Humphrey's Ex'r* v. *United States,* 295 U. S.

602, 627–628. The necessary corollary of that ruling is that Congress cannot constitutionally divest the President of his power to guide his subordinates in the discharge of executive or political duties. Cf. *Mississippi* v. *Johnson*, 4 Wall. 475. To require executive officers to be independent of Presidential direction and yet subject to a plenary power of removal would be to sanction inefficient and arbitrary government. The inevitable possibility of dismissal for having failed to execute the laws and duties of their respective departments in a manner approved by the President "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Cf. *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C. A. 2).

Further, as a practical matter, it must be supposed that the President's subordinates would not knowingly depart from the policies laid down by him. Cf. *Humphrey's Ex'r* v. *United States*, 295 U. S. 602, 629. It would be incongruous for the President to have his will done by his subordinates in this way, and yet escape all censure and responsibility as if what is done were truly independent of his control. The framers of our Constitution saw this, and vested in the President full power to meet his responsibility to "take Care that the Laws be faithfully executed."

The force of this position is not lessened here because the instant statute, which does not prescribe mere ministerial duties, concerns the

tenure of inferior officers. Concededly, as incident to its legislative power under Art. II, § 2, to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, * * * or in the Heads of Departments," Congress may, to some extent, restrict the latter in the exercise of the power of removal. It does not follow, however, that Congress could draw to itself "the power to remove or the right to participate in the exercise of that power." *Myers* v. *United States, supra,* at 161. Since that power of removal is an executive power which can be exercised only by the executive, it must, as we have seen, be subject to Presidential control and guidance. The President's power and responsibility to "take Care that *the* Laws be faithfully executed" [emphasis added] necessarily includes all the laws, not just some of the laws. Cf. *In re Neagle,* 135 U. S. 1, 63–64. The desirability of "unitary and uniform execution of the laws" (*Myers* v. *United States, supra,* at 135) is certainly no less important in the field of executive personnel administration than it is elsewhere. Indeed, proper personnel administration goes to the heart of the President's ability to discharge his constitutional responsibility to carry out the laws. To paraphrase the statement of former Chief Justice Hughes, the power of the President to execute the laws is "the power to [do so] successfully." See *Hirabayashi* v. *United States,* 320 U. S. 81, 93.

(b). Accordingly, if Congress had meant to prohibit the President from acting in this respect under P. L. 733, a serious question as to the validity of that enactment would arise. We agree with the court below, however, that that problem is not here presented. Cf. *Ex parte Quirin*, 317 U. S. 1, 29, 47. "Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the enactment." (R. 59.)[16] This conclusion is strengthened by the fact that, as long ago as 1871, the Congress explicitly authorized the President "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof * * * and establish regulations for the conduct of persons who may receive appointments in the civil service." R. S. 1753 (5 U. S. C. 631); see also the Civil Service Act of 1883 (22 Stat. 403, as amended, 5 U. S. C. 632 *et seq.*).[17]

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[16] "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r v. United States*, 295 U. S. 602, 629.

[17] Both statutes are cited in the Preamble of Executive Order 10450 (Appendix, *infra*, p. 5a).

As we view this case, R. S. 1753 itself furnishes sufficient statutory authority for those portions of the Executive Order which petitioner challenges as unlawfully divesting agency heads of their discretion. Admittedly, P. L. 733 does authorize agency heads to terminate employment "notwithstanding the provisions of section 6 of the [Lloyd-LaFollette Act] or the provisions of any other law" when they deem it necessary or advisable in the interests of national security. But the laws thus made inapplicable in the discretion of the agency heads must be viewed as limited to Congressional enactments which would otherwise restrict the removal power, rather than to Presidential regulations under R. S. 1753 implementing the executive power of removal. Moreover, even assuming that P. L. 733 does authorize agency heads to disregard Presidential regulations in their discretion, the Act certainly does not repeal the power of the President to establish such regulations nor prohibit agency heads from following such regulations. As the court below pointed out (R. 59), petitioner's "argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a superior. That position is untenable on its face. * * * Perhaps, if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here."

4. *Congress has ratified the issuance of Executive Order 10450.*—There is another reason why Executive Order 10450 should not be read as in conflict with P. L. 733. It is well settled that Congress may ratify acts which it might have authorized and give the force of law to official action unauthorized when taken. Cf. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 301–302; *Hirabayashi* v. *United States*, 320 U. S. 81, 91. Hence, if Congress has confirmed and ratified the action of the Chief Executive, the absence of legislative sanction for the Executive Order at the time of its issuance is immaterial.[18] That Congress did, in fact, accept and ratify the President's action is shown by a series of events subsequent to the issuance of the Order.[19]

[18] This part of the brief is immediately directed to the question whether the Order unlawfully divests agency heads of the discretion vested in them by P. L. 733, but the discussion with respect to Congressional ratification of the Order is also pertinent to the primary question whether P. L. 733 authorizes the President to extend its provisions to non-sensitive positions in non-sensitive agencies. See *supra*, pp. 20–42.

[19] Petitioner argues (Pet. Reply 5) that these events cannot supplant the contemporaneous intent of the Congress which enacted P. L. 733, citing such cases as *Fogarty* v. *United States*, 340 U. S. 8, 14. But we do not rely upon these later events as aids in the construction of P. L. 733; we refer to them as evidence of subsequent Congressional ratification of executive action.

Prior to the enactment of P. L. 733 in August 1950, Congress had attacked the problem of employee security by piecemeal legislation. As noted above, p. 25, the Army, Navy, and Coast Guard were given summary dismissal power by the Act of December 17, 1942 (56 Stat. 1053). The same power was later given to the Secretary of Defense by Section 630 of the Act of October 29, 1949 (63 Stat. 987). In 1946, the first so-called McCarran rider was attached to the Department of State Appropriation Act, 1947 (Act of July 5, 1946, 60 Stat. 458), authorizing the Secretary of State to terminate the employment of any employee when he deemed it "necessary or advisable in the interests of the United States." The two Defense Department statutes and the then current McCarran rider (Section 104 of the Act of July 20, 1949, 63 Stat. 447, 456) were expressly repealed by Section 4 of P. L. 733 (Appendix, *infra*, p. 4a). The following month, however, the McCarran rider was reenacted for the State Department and its provisions were also extended to the Department of Commerce. See General Appropriation Act, 1951, approved September 6, 1950, 64 Stat. 595, 768, § 1213. These riders again appeared in the Department of State Appropriation Act, 1952 (65 Stat. 581, § 103), 1953 (66 Stat. 555, § 103) and in the Department

of Commerce Appropriation Act, 1952 (65 Stat. 594, § 304), 1953 (66 Stat. 567, § 304).[20]

Shortly after the issuance of Executive Order 10450 in April 1953, the 1954 Appropriation Acts for the Departments of State, Commerce, and Justice came before the Congress. As reported out by the House Committee on Appropriations, the State and Commerce Department bills contained the usual dismissal rider and a similar provision had been inserted for the first time in the Justice Department bill. The riders were subjected to extensive discussion in the House and the Senate. See 99 Cong. Rec. 4511–4514, 4518–4523, 4524–4525, 4527–4529, 4534–4537, 4538, 4540, 4541, 4542–4543, 5818–5828, 5833–5835, 5986–5990. During the course of debate in the House, the full texts of both P. L. 733 and Executive Order 10450 were inserted in the Congressional Record. See 99 Cong. Rec. 4519–4523. After comprehensive debate, the riders were eliminated, it being the sense of the Congress that the Executive Order, properly promulgated under

[20] These various provisions for summary dismissal in the complete discretion of the agency head had the effect of making the requirements of the Lloyd-La Follette and Veterans Preference Acts inapplicable to those particular agencies, so long as the summary dismissal provisions remained in effect. Cf. *Myers* v. *Hollister*, (226 F. 2d 346 (C. A. D. C.), pending on petition for a writ of certiorari, No. 637, this Term; *Schey* v. *Weeks*, C. A. D. C., No. 12827, decided January 19, 1956.

P. L. 733, adequately covered the field and afforded employees proper protection.

The action thus taken by Congress was more than mere silent acquiescence in a well-publicized Presidential Order. Congressional rejection of the appropriation riders was a conscious choice of policy: Congress affirmatively expressed its will to accept the Order as the prevailing regulation. Cf. *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 53. Further evidence of ratification is found in the fact that Congress thereafter appropriated funds for the Federal Bureau of Investigation and the Civil Service Commission to conduct their investigations under Sections 3 (a), 8 (c), 8 (d), and 9 of the Executive Order.[21] As

[21] Although the Appropriations Acts for 1955 and 1956 for the Department of Justice and the Civil Service Commission are in lump sums without allocation for this specific purpose, the allocations do appear in the testimony of agency representatives at the hearings on the bills. See *e. g.*, Hearings before the House Subcommittee on Appropriations, 83d Cong., 2d sess., on Department of Justice Appropriations for 1955, pp. 164–165; Hearings before the House Subcommittee on Appropriations, 84th Cong., 1st sess., on Department of Justice Appropriations for 1956, pp. 168–169; Hearings before the House Subcommittee on Appropriations, 83d Cong., 2d sess., on Independent Offices Appropriations for 1955, Part I, pp. 950–952, 960, 979–980, 986–999, 1008–1017; Hearings before the House Subcommittee on Appropriations, 84th Cong., 1st sess., on Independent Offices Appropriations for 1956, Part I, pp. 553, 561, 582–588, 591–594, 606, 637–638. As to the Civil Service Commission, it should be noted that the appropriations are for "national agency checks." Insofar as "full field investigations" are concerned, funds are obtained from a revolving fund established in 1952 (5 U. S. C. 657).

this Court has announced, "the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive." *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Ludecke* v. *Watkins*, 335 U. S. 160, 173, n. 19; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116, 119.[22]

[22] Petitioner contends (Pet. Reply 6) that this evidence of Congressional ratification is entitled to no weight because representatives of the Executive branch have supposedly informed Congressional Committees that P. L. 733 and the Executive Order are not used to discharge a loyal employee holding a non-sensitive position in a non-sensitive agency. In particular, petitioner points to the testimony of Philip Young, Chairman of the Civil Service Committee, and Assistant Attorney General William F. Tompkins during the Hearings before the Senate Subcommittee on Reorganization of the Committee on Government Operations, 84th Cong., 1st sess., on S. J. Res. 21. But Mr. Young expressly stated that it was certainly conceivable to him to have "a position which would fall for adjudication under Executive Order 10450, section 8 (a), which was classified by the head of the agency as nonsensitive and yet which could have a direct relationship to the national security." *Id.* at 530. A fair reading of Mr. Tompkins' testimony discloses that he was referring only to individuals in non-sensitive positions against whom there was derogatory information relating to suitability rather than to loyalty or security. (Compare Section 2 of the Security Program Regulations of the Department of Health, Education, and Welfare, Bureau of National Affairs, *Government Security and Loyalty*, p. 15; 561). Any misunderstanding in the minds of the Committee was subsequently dissipated by Mr. Tompkins' later letter in which he expressly stated that (*id.* at 141):

"* * * Obviously, the Executive order is applicable to virtually all civilian employees of the executive branch of the Federal Government and, since the effective date of the

C. PETITIONER CANNOT CHALLENGE HIS DISMISSAL ON THE GROUND THAT IT WAS NOT IN THE INTEREST OF THE NATIONAL SECURITY

In addition to his basic contentions that Congress did not intend P. L. 733 to apply to employees such as he, and that Executive Order 10450 conflicts with the Act, petitioner also appears to argue that his removal was invalid as not actually necessary or advisable in the interest of the national security (Pet. Br. 30–34).

Insofar as the claim is that it was not necessary in the interest of the national security for the President to extend P. L. 733 to the Department of Health, Education, and Welfare, we have already answered that that is not a matter of judicial cognizance (see *supra*, pp. 22–23).

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order, Public Law 733 has likewise been applicable to all such employees. As I emphasized in my testimony, the final decision in any personnel security case rests by law on the head of the agency or department concerned.

"The law and the Executive order require him to determine whether the employment or continued employment of each employee of the Department or agency is clarly [sic] consistent with the interests of national security. The sensitivity of the employee's position and the nature of the derogatory information are two of the factors which the head of the Department or agency takes into account in making his determination."

Petitioner also adverts (Pet. 15; Pet. Br. 18) to pages 59–60 of the Hearings where Mr. Tompkins, according to petitioner, informed the Committee that the President has no power to coordinate the actions of his subordinates under P. L. 733. But all that Mr. Tompkins meant was that the President has no power to change the procedural steps leading to dismissal which P. L. 733 prescribed; the Order, of course, did not purport to change those procedures.

The alternative claim that Secretary Hobby erred in determining that petitioner's employment should be terminated as not in the interests of the national security is also not reviewable on this record. There is no showing or allegation—aside from the general assertion that a loyal person in a non-sensitive position cannot be a "security risk" (discussed below)—that the Secretary acted on grounds so unrelated to the national security that her action must be termed arbitrary or capricious. In these circumstances, the issue is identical to the oft-repeated claim in removal cases that discharge would not in fact promote the good of the service; and it has been repeatedly held that the courts will not inquire into the merits of an administrative determination of what constitutes cause for discharge, at least in the absence of a showing of arbitrary or capricious action plainly unconnected with the good or efficiency of the federal service. *E. g., Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290; *Williams* v. *Cravens,* 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Carter* v. *Forrestal,* 175 F. 2d 364 (C. A. D. C.), certiorari denied, 338 U. S. 832. The courts have so ruled where the governing statutes prescribed an apparently objective basis for removal, *i. e.*, that no civil service or preference eligible employee shall be discharged "except for such cause as will promote the efficiency of the service" (5 U. S. C. 652, 863). Accordingly, this principle is *a fortiori* applicable

here where the statute provides for termination in the discretion of the agency head and makes his decision final and conclusive. Cf. *Weinstein* v. *United States*, 109 C. Cls. 579.

Nor is there any merit to the contention (Pet. Br. 30–1, 32) that the Court should hold, as a matter of law, that the dismissal of a loyal employee in a non-sensitive position *cannot* be in the interest of the national security. The charges against petitioner concerned close association with Communists and with an organization asserted to be subversive (R. 16–17). In the present posture of the case, petitioner cannot and does not attack those charges, or some of them, as the basis for his discharge.[23] And it seems plain that retention of even a loyal employee, not in a policy position and without access to classified information, may be inconsistent with the demands of the national security if he continues a close association with subversive persons or organizations. Information which should not be known to Communists, even though unclassified, may be transmitted in good faith or inadvertently; as the Petrov episode in Australia indicates, a loyal employee in close contact with subversives may be used, unknown to himself, as a dupe or pawn; continued propagandization from close associates (even though

[23] As the Statement shows (*supra*, pp. 5–6), petitioner did not make a timely effort to contest the charges within the Department of Health, Education, and Welfare. See also *infra*, pp. 71–73.

covert) may sow the seeds of disloyalty. All these factors, and others, show that the Secretary's determination in petitioner's case cannot be convicted of irrationality as a matter of law.

By the same token, P. L. 733 is not invalid because it permits a dismissal on such grounds. Congress could reasonably decide that the danger to the country's interests from the continued employment of persons like petitioner outweighs the immediate injury to the employee; the latter's interests are to be protected (aside from the procedural safeguards which are not involved in this case) by the provision contemplating possible reemployment (*supra*, pp. 34–35, 43–44; *infra*, pp. 3a–4a, 8a–9a). Unlike the state statute involved in *Wieman* v. *Updegraff*, 344 U. S. 183, P. L. 733, as applied to petitioner, does not stigmatize as *disloyal*, and therefore marked with a "badge of infamy", mere innocent membership in alleged subversive groups. As applied here, the Act provides for the removal on "security" and not "loyalty" grounds of an employee whose retention, though he may be loyal, is reasonably believed to be detrimental to the national security because of his close and sympathetic association with Communists which he asserts he will continue (R. 19; see *supra*, pp. 4–6, *infra*, pp. 71–72).[24]

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[24] Petitioner also relies on *Ex parte Endo*, 323 U. S. 283 (Pet. Br. 30), but obviously the present dismissal Act is far different from the provision for internment of Americans of Japanese descent in a War Relocation Center.

II

PETITIONER WAS FURNISHED "A WRITTEN STATEMENT OF THE DECISION OF THE AGENCY HEAD" WITHIN THE MEANING OF P. L. 733

Petitioner's final contention is that, assuming that P. L. 733, as extended by the Executive Order, authorized the Secretary to terminate his employment, his discharge was unlawful for failure to comply with a procedural requirement of that Act. The argument is that the provision in Section 1 of P. L. 733 that the employee be furnished "a written statement of the decision of the agency head" means a statement of the reasons for the result, rather than a statement of the ultimate determination made by the agency head (Pet. Br. 48–51). Here again, petitioner seeks to read something into the Act which Congress did not say. Congress did not use the word "reasons", it used "decision"; and there is nothing in the legislative history of the Act which suggests that Congress intended "decision" to mean "reasons." Moreover, petitioner was fairly apprised of the reasons for his removal.

A. To buttress his argument, petitioner resorts to such cases as *Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.), and *Blackmar* v. *United States*, 120 F. Supp. 408 (C. Cls.), which hold that an employee is entitled to a statement of the reasons for his dismissal under the Lloyd-LaFollette and Veterans' Preference Acts. But P. L. 733 ex-

pressly makes those statutes inapplicable, and their terms are markedly different in this respect from those of P. L. 733. Section 6 of the Lloyd-LaFollette Act (5 U. S. C. 652) provides in pertinent part that "no person in the classified civil service of the United States shall be *removed* or suspended without pay therefrom *except* * * * *for reasons given in writing.* Any person whose removal or suspension without pay is sought shall (1) have *notice* of the same and *of any charges* preferred against him; (2) be furnished *a copy of such charges;* * * * and (4) [after filing an answer] be furnished at the earliest practicable date with a *written decision* on such answer. * * * *Copies of the charges,* the notice of hearing, the answer, *the reasons for removal* or suspension without pay, and the *order of removal* or suspension without pay shall be made a part of the records of the proper department or agency, * * *." (Emphasis added.) From the several terms employed, it is apparent that even in the Lloyd-LaFollette Act "decision" does not mean "reasons." The Act plainly draws a distinction between "charges," "decision" and "reasons for removal", but requires that all three be furnished employees.

Although Section 14 of the Veterans' Preference Act (Appendix, *infra,* pp. 17a-18a) does not employ the word "charges," it too draws the same distinction between "charges," "decision," and "reasons for removal". It provides that "no permanent or indefinite preference eligible * * * shall

be *discharged* * * * *except* * * * *for reasons given in writing*, and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * * stating any and all *reasons*, specifically and in detail, *for any such proposed action*; such preference eligible shall be allowed a reasonable time for answering the same * * * and shall have the right to appeal to the Civil Service Commission from an adverse *decision of the administrative officer* * * *; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its *findings and recommendations* to the proper administrative officer and shall send copies of the same to the appellant * * *." (Emphasis added.) Thus, like the Lloyd-LaFollette Act, the Veterans' Preference Act also requires that employees be furnished "reasons * * * for any such proposed action" (*i. e.*, charges), a "decision", and "reasons given in writing" for discharge. The distinction between "decision" and "reasons" is further emphasized by the requirement that, on appeal, the Civil Service Commission make "findings," *i. e.*, the reasons for removal, and "recommendations," *i. e.*, the decision.

In sharp contrast, P. L. 733 does not state that an employee shall be furnished with the "reasons" for his removal. It provides only that an employee shall be given (Appendix, *infra*, pp. 2a–3a) "(1) a written statement within thirty days after his suspension of the *charges* against

him * * * stated as specifically as security considerations permit * * * and (3) [after an opportunity to answer and be heard] a written statement of the *decision* of the agency head * * *." (Emphasis added.)[25]

Unless the unwarranted assumption be made that the language of these three Acts was chosen inadvertently, it must be concluded that Congress did not intend that employees be furnished more than a statement of the ultimate determination reached by the agency head under P. L. 733. We think it not without significance that the Civil Service Commission, the expert administrative body in this field, has so construed the statutes. With respect to the Lloyd-LaFollette and Veterans' Preference Acts, the Commission's regulations provide that decisions thereunder must contain the reasons for the actions taken. See 5 C. F. R. 9.102; 5 C. F. R. 22.10. As to P. L. 733, however, the Commission's instructions to agency hearing boards direct that "[t]he decision will not contain the reasons upon which the board

[25] It should also be observed in this connection that petitioner's reliance on Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)) is misplaced. Petitioner cites that section as supposedly illustrative of Congressional usage of the term "decision" as meaning "reasons" (Pet. Br. 50). In fact, however, as is true in the Lloyd-LaFollette and Veterans' Preference Acts, Section 8 (b) of the Administrative Procedure Act expressly specifies that "[a]ll decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, * * *." Significantly, Congress did not so specify in P. L. 733.

based its conclusion. A separate *Memorandum of Reasons* will be prepared for that purpose." See Bureau of National Affairs, *Government Security and Loyalty*, p. 15:583. The instructions further state that "[a]ll decisions, favorable or unfavorable, will be in the language of the Security Standard provided by Executive Order 10450. Suggested language for the decision is: 'It is the decision of this Security Hearing Board that the employment of (Mr., Miss, or Mrs.—full name of individual) is (or, is not) clearly consistent with the interests of national security.'" *Id.* at p. 15:584.

While the legislative history of P. L. 733 offers no explanation why Congress did not require that employees be given the reasons for their removal, one may safely attribute the absence of any such provision to Congressional awareness that security considerations would frequently preclude furnishing an employee with a specific and detailed exposition of the reasons warranting dismissal. Thus, unlike the Veterans' Preference Act which requires that "any and all" charges be stated "specifically and in detail," P. L. 733 provides that the charges "shall be stated as specifically as security considerations permit." The same factors which moved Congress to make that provision as to charges probably led to the requirement that only the "decision" and not the "reasons" be stated in writing.

B. Assuming, however, that P. L. 733 requires something more than a mere statement of the determination by the agency head that employment should be terminated, there has been "substantial compliance" (*Williams* v. *Cravens*, 210 F. 2d 874, 876 (C. A. D. C.), certiorari denied, 348 U. S. 819) in this case. Fairly read, the Secretary's letter fully apprised petitioner of the basis upon which the determination rested. Specific reference was made to the letter of the Under Secretary, to the statement of charges, and to the sections of the Executive Order upon which the charges were based. Reference was likewise made to petitioner's reply, to his refusal to offer any explanation "regarding the associations carried on in your private life," and to his statement that he intended to continue "* * * to associate with any persons or groups of persons whom you see fit to choose." The letter then stated that the Secretary's conclusion was "[b]ased on a study of all the documents in your case, including your reply to reference letter * * *." (R. 21.)

In the light of petitioner's refusal to request a hearing, it is clear that the Secretary need not give him a more elaborate or detailed statement of the "reasons" for his dismissal than she did. Nothing had been added to the case for or against petitioner since the charges were issued. Petitioner does not here complain of the suffi-

ciency of the statement of charges,[26] and it must be presumed that the charges were "stated as specifically as security considerations permit," as the Act required. The Secretary consequently need do no more in furnishing the statement of her decision than to refer again to the charges.

Petitioner further objects that the Secretary did not in so many words make a determination that his discharge was "necessary or advisable in the interest of the national security" (Pet. Br. 46, 48, n. 23). This objection is specious. Plainly, P. L. 733 does not require agency heads to employ a talismanic formula in effecting discharges. The Secretary's letter states that "* * * it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954." (R. 21.) In view of the President's finding in Execu-

[26] In requesting reopening of his case, petitioner's attorney contended that the charges were insufficiently stated (R. 30). This contention was apparently abandoned on petitioner's attempted appeal to the Civil Service Commission (R. 8–9). Similarly, the complaint filed in the District Court does not allege that petitioner's discharge was invalid for want of adequate charges (R. 10–11). In any event, such a contention would be without merit since the charges are in fact sufficiently specific and the degree of specificity of charges under the Act is a wholly discretionary matter. Cf. *Bailey v. Richardson*, 182 F. 2d 46, 52 (C. A. D. C.), affirmed by an equally divided court, 341 U. S. 918.

tive Order 10450 that national security requires that no employee be retained unless his employment is clearly consistent with the interest of national security, the Secretary's determination that petitioner's continued employment was not clearly consistent with the interest of national security, followed by her termination of his employment, obviously constituted a determination that his discharge was "necessary or advisable in the interest of the national security." See *supra*, pp. 45–48.

That the necessary determination was made is further shown by the Secretary's regulations which state that, pursuant to the authority vested in her by P. L. 733 and the Executive Order, "[i]t shall be the policy of the Department * * * to employ and to retain in employment only those persons whose employment or retention in employment is found to be clearly consistent with the interests of the national security" (Sec. 2), and that "[n]o person shall be employed, or retained as an employee, in this Department unless the employment of such person is clearly consistent with the interests of the national security" (Sec. 3 (a)). See Bureau of National Affairs, *op. cit. supra* at pp. 15:561, 15:562. Having thus defined in the regulations what she deemed to be "necessary or advisable in the interest of the national security" with respect to all employees of the Department, the Secretary's finding in any individual case that

continued employment is not clearly consistent with the interests of national security necessarily incorporates the determination that discharge is "necessary or advisable in the interests of the national security."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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FEBRUARY 1956.

APPENDIX

P. L. 733

[Public Law 733—81st Congress]

[Chapter 803—2d Session]

(64 Stat. 476, 5 USC 22–1)

AN ACT To protect the national security of the United States by permitting the summary suspension of employment of civilian officers and employees of various departments and agencies of the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 USC 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, De-

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partment of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an oppor-

tunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further,* That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine

whether any such person is eligible for employment by any other agency or department of the Government.

SEC. 2. Nothing herein contained shall impair the powers vested in the Atomic Energy Commission by the Atomic Energy Act of 1946 or the requirements of section 12 of that Act that adequate provision be made for administrative review of any determination to dismiss any employee of said Commission.

SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

SEC. 4. Section 3 of the Act of December 17, 1942 (56 Stat. 1053), and section 104 of the Act of July 20, 1949 (Public Law 179, Eighty-first Congress), and section 6[illegible]0 of the Act of October 29, 1949 (Public Law 434, Eighty-first Congress), are hereby repealed.

Approved August 26, 1950.

EXECUTIVE ORDER 10450

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, et seq.); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SEC. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the depart-

ment or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided,* that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835

or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, That no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic

organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other

than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a). There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of

such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before

the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date

of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least

semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any such deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Civil Service Commission in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Commission as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Civil Service Commission is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,
April 27, 1953.

Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 390, as amended, 5 U. S. C. 863) provides as follows (as it appears in the United States Code):

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay; reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing with-

in a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.